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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 505

WARDEN, MARYLAND PENITENTIARY,
Petitioner,

v.

MORRIS RUCKLE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Warden of the Maryland Penitentiary, by Thomas B. Finan, Attorney General of Maryland, and John W. Sause, Jr., Assistant Attorney General of Maryland, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on June 18, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court for the District of Maryland (R. Vol. I, 29-32) is unreported and is printed in Appendix A hereto (*infra*, pp. 35a-38a). The majority and dissenting opinions of the Circuit Court of Appeals, printed in Appendix hereto, *infra*, pp. 38a-46a, and are as yet unreported. Opinions in companion cases directly affecting the matter here involved are also printed in Appendix A. For the convenience of the Court opinions in collateral proceedings instituted by the Respondent are printed in Appendix B.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 18, 1964 (R. Vol. II, 19; *infra*, p. 46a). An order staying said judgment and mandate pending the filing of this Petition and action thereon by this Court was passed July 2, 1964 (R. Vol. II, 24). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Does the Constitution of the United States require a state court to force a prisoner to accept a retrial at the risk of a sentence greater than that imposed upon him after the first trial?*

2. May a prisoner, with full knowledge that his rights were abridged during the course of his trial, specifically refuse to assert those rights for purposes of securing a new trial?

STATUTES INVOLVED

Annotated Code of Maryland (1957 Edition), Article 27:

§337. *Generally. Kidnapping.*

Every person, his counsellors, aiders or abettors, who shall be convicted of the crime of kidnapping and forcibly or fraudulently carrying or causing to be carried out of or within this State any person, except in the case of a minor, by a parent thereof, with intent to have such person carried out of or within this State, or with the intent to have such person concealed within the State or without the State, shall be guilty of a felony and shall be sentenced to death or to the penitentiary for not more than thirty years, in the discretion of the court.

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* This is the exact form of the question posed and answered in the negative by Judge Haynsworth in his dissenting opinion below (*infra*, p. 46a).

§488. *Robbery with deadly weapon.*

Every person convicted of the crime of robbery or attempt to rob with a dangerous or deadly weapon or accessory thereto, shall restore to the owner thereof the thing robbed or taken, or shall pay him the full value thereof, and be sentenced to imprisonment in the Maryland Penitentiary for not more than twenty years.

STATEMENT

Trial And Appeal

In May, 1957, Morris Ruckle, the Respondent herein, was tried jointly with Curtis Edward Midgett and John Davis in the Criminal Court of Baltimore on charges out of an incident which had occurred in January of that year. Following a finding by a jury of guilt on both charges, Ruckle was sentenced to consecutive terms in the Maryland Penitentiary of twenty years for armed robbery (the maximum punishment under Maryland law — see above) and fifteen years for kidnapping (the maximum penalty for which is death — p. 2, *supra*).

Ruckle and Midgett entered appeals to the Court of Appeals of Maryland. Before the appeal was argued, Ruckle, on November 21, 1957, dismissed his appeal. His articulate pleading, filed in proper person, is quoted in full in one of the opinions appended hereto (pp. 22a-23a). It was there stated that "Appellant does not desire such an appeal for purposes of securing a new trial" and that "the only issue desired by appellant to be resolved is the propriety of consecutive fifteen and twenty year sentences imposed for the several offenses arising from the one continuous crime of kidnapping" (*infra*, p. 22a). In a "Conclusion," he summarized:

> "Therefore, it appearing that appellant does not desire the appeal for a new trial, and that the of sentence is estopped for lack of exception, it is moved

that said appeal be dismissed without prejudice" (*infra*, p. 23a).

On March 4, 1958, the Court of Appeals of Maryland reversed the convictions of the co-defendant, Midgett. *Midgett v. State*, 216 Md. 26, 139 A. 2d 209; *infra*, pp. 1a-15a. The primary reason for reversal arose from the following undisputed facts, as stated by the Court at 216 Md. 36; *infra*, p. 7a:

> "It is conceded that the defendant was absent from the courtroom on the two separate occasions when the trial court undertook to answer questions which had been addressed to the court by the jury. The answers were not given to the jury in open court but through an exchange of notes while the jurors remained in their jury room. It is also conceded that on the first occasion[1] counsel for the defendant was absent; and that on the second occasion[2] counsel was present and was informed by the court of the questions propounded and the answers thereto."

The Court held that the Maryland Constitution guaranteed to a criminal accused the absolute right to be present at every stage of his trial; that there could be no valid trial or judgment unless he is afforded the right; that the right is personal and may not be waived by counsel; and that the conduct of the trial court in the trial of Midgett constituted an abridgement of that right. Subsidiary error was found by the Court in that the trial judge's instructions relative to the crime of kidnapping were misleading, confusing and "particularly ambiguous with respect to the

---

[1] When the jurors' question was: "If found guilty of kidnapping can we be sure the death penalty will not be given?", the judge's answer being "Yes."

[2] When the jurors' question was: "Can verdict be stated guilty of kidnapping with assurance of no death penalty?", to which the answer was "If verdict is guilty, death sentence will not be imposed."

distinction between kidnapping and false imprisonment." 216 Md. at 38; *infra*, p. 9a.

It is and has always been conceded that each of these errors would have been applicable to Ruckle if he had continued his appeal.

Collateral Relief Prior To This Proceeding

Ruckle, having withdrawn his appeal, was legally unaffected by this decision. However, he was not unaware of the result; and filed an application for writ of *habeas corpus* in the State courts. Upon its denial (on the ground that "the question which forms the basis of the petition herein is one that could have been decided by the Court of Appeals, and the petitioner voluntarily withdrew his appeal to that court" — *infra*, p. 48a), he filed a similar application in the federal District Court, which denied the request "because he has not exhausted his state remedies" *infra*, pp. 48a-49a.

In October, 1958, Ruckle filed a petition in Maryland for relief under the Uniform Post Conviction Procedure Act. Under the heading "Conclusion," he "prayed that the petition be granted, the judgments complained of declared void, and Defendant *discharged to his freedom without further jeopardy*" (emphasis supplied), *infra*, p. 23a. The court held (a) that the plea for immediate release "is equivalent to saying that since he abandoned his appeal, he is entitled to a preferred status over Midgett, who, of course, is entitled only to a new trial" (*infra*, p. 19a); (b) that the right to jury trial could be waived; and, finally (*infra*, p. 19a):

> "There is no doubt that if the petitioner, Ruckel. [sic] had knowledge of the transmittal of messages between the court and jury during the trial of the cases against him when he withdrew his appeal and

> before the expiration of time for appeal, his failure to proceed with his appeal would constitute a waiver of his rights which he now claims were violated. However, the court does not have before it any evidence that the petitioner knew of the aforesaid messages at or before the times mentioned, and for that reason the court concludes that he has not waived his asserted rights."

The court therefore awarded a new trial (*infra*, p. 20a),

Ruckle sought leave to appeal to the Maryland Court of Appeals from this disposition on the ground that "because he had dismissed his appeal from the invalid judgment and sentence, he was entitled to immediate and final release from custody and that granting him a new trial was not sufficient" (*infra*, p. 21a). The Court of Appeals denied the application for leave to appeal. *Ruckle v. Warden*, 220 Md. 683, 155 A. 2d 69; *infra*, pp. 20a-21a.

In 1960, Ruckle sought release on the ground that he had "no conviction of crime or sentence imposed upon him by any court of the State of Maryland" (*infra*, pp. 49a-50a). It was found that he was legally in custody awaiting his new trial in conformity with the order in the Post Conviction proceeding (*infra*, p. 50a). In another State *habeas corpus* petition filed shortly thereafter, he asserted unsuccessfully that he was "illegally held in custody waiting a new trial on indictments for the same crimes of which he has previously been convicted" (*infra*, pp. 51a-52a).

In 1961, Ruckle filed a petition for writ of *habeas corpus* in the federal District Court (*infra*, pp. 52a-54a). Relief was denied; a certificate of probable cause refused "without prejudice" by the Fourth Circuit Court of Appeals (*infra*, pp. 54a-55a); and *certiorari* was denied by this Court. 371 U.S. 845, 9 L. Ed. 2d 80, 83 S. Ct. 77.

Prisoner's Refusal Of New Trial

On March 23, 1962, Ruckle was brought before the Criminal Court of Baltimore for rearraignment prior to a new trial. Excerpts from these proceedings were filed in the court below (R. Vol. I, p. 28 at p. E. 1-4) and are extensively quoted at pages 10-11 hereof. Ruckle stated, from the witness stand, that he did not want a new trial, e.g., "I never wanted a new trial from the very beginning and I made it very clear to the Judge that ruled before he ruled" (*ibid*, at p. E. 2). The court thereupon reinstated the original judgments and sentences, and filed a lengthy memorandum of its reasons for not requiring Ruckle to submit to a new trial if he did not desire one (*infra*, pp. 21a-32a). The action of the court was affirmed on direct appeal to the Court of Appeals of Maryland (230 Md. 580, 187 A. 2d 836; *infra*, pp. 32a-34a), and *certiorari* was denied by this Court (374 U.S. 816, 10 L. Ed. 2d 1040, 83 S. Ct. 1711).

Proceedings Below

For the third time, Ruckle filed an application for writ of *habeas corpus* in the federal District Court. On July 23, 1963, Judge Harrison L. Winter found that "Petitioner makes abundantly clear that he is not interested in a new trial on the original indictments but, rather, contends that he is entitled to immediate release" (*infra*, p. 36a). After summarizing the historical background of the case and noting the effect of *Fay v. Noia*, 372 U.S. 391, in "severely limiting application of the doctrine of waiver," he held that:

> "Even without a hearing the record is abundantly clear that petitioner knew the relief to which he was entitled [a new trial as allowed in the post conviction proceeding] and, with such knowledge, has refused that relief. Under the circumstances, there is no ground for federal *habeas corpus* relief" (*infra*, pp. 37a-38a).

Two judges of the Fourth Circuit Court of Appeals reversed this ruling and directed that the case be remanded to the District Court "with directions to hold the same on the docket for a reasonable period, to afford the state the opportunity to retry Ruckle on the indictment" (*infra*, p. 41a). Circuit Judge Haynsworth dissented and filed a separate opinion (*infra*, pp. 42a-46a).

REASONS FOR GRANTING THE WRIT

In this proceeding, the facts which were characterized as "if not unique . . . seldom encountered" by the District Court (*infra*, p. 35a) and "somewhat unusual" by the majority opinion of the Fourth Circuit (*infra*, p. 41a), are still more noteworthy by reason of the fact that the State is aligned with the prisoner, one judge of the Fourth Circuit, the Court of Appeals of Maryland, the United States District Court, and the Criminal Court of Baltimore in urging a legal proposition that is disputed by two judges of the Fourth Circuit and the prisoner's court-appointed counsel: that the prisoner should not be forced to a retrial.

There is no dispute, however, in two important areas of fact: that as a matter of law of Maryland, there was error at Ruckle's trial in May, 1957 and that because of such error he was *entitled* to a new trial; and that upon conviction in a new trial, sentences of death or fifteen additional years imprisonment (above the 35 year term imposed at the first trial) would be permissible under the applicable statutes (*supra*, pp. 2-3).

The chief disagreement results from the restrictive gloss put upon the facts by the majority opinion in the Fourth Circuit, when it said (*infra*, p. 41a):

> "Here the defendant did not unqualifiedly waive his right to a new trial. His refusal to *accept* a new trial

was based on his expressed belief that he was entitled to unconditional release. Forfeiture of life or liberty should not be held to have occurred when the circumstances leave room for doubt as to whether the alleged waiver was fully understood, intended and free from coercion."

This language was somewhat complementary with the first sentence of the succeeding paragraph, as contained in the opinion as originally handed down, that Ruckle "is now prepared to submit to a new trial' (*infra*, p. 41a, footnote). When the opinion was amended, because counsel for the prisoner took exception to it, the new language was something less of a sequitur (*infra*, p. 41a):

". . . he [Ruckle] adheres to his refusal to consent to a retrial and intends to plead former jeopardy if put on trial. We hold merely that he is not foreclosed from any plea he wishes. We are not called upon in this proceeding to consider the merits of such a plea. If made, it can be dealt with at his new trial in regular course."

Clearly, this change destroys the force of the holding that "the defendant did not unqualifiedly waive his right to a new trial" since he does not (as originally felt by the majority) unqualifiedly agree to a new trial, but agrees only upon the theory that he will thereby be given a vehicle to present his main argument concerning double jeopardy. The objections to the conclusion reached by the Fourth Circuit are that it cannot be supported by the record, and that it has procured Appellant's acquiescence on the purely illusory proposition that he will be allowed to make his contentions with regard to double jeopardy.

(a) *Lack of support in the record*

Ruckle's desire to avoid a new trial is present in every proceeding in which he has been involved. His withdrawal

of appeal was based upon the fact that he did "not desire such an appeal for purposes of securing a new trial" (*infra*, p. 22a); he urged the Post Conviction judge that "he was entitled to be released immediately and finally from custody of the warden of the Penitentiary, and that granting him a new trial would not be sufficient" (*infra*, p. 19a); and the whole basis for his application for leave to appeal from that decision was "that because he had dismissed his appeal from the invalid judgment and sentence, he was entitled to immediate and final release from custody and that granting him a new trial was not sufficient" (*infra*, p. 21a).

Ruckle persisted in this position at the time of his re-arraignment prior to trial. The following are excerpts from his testimony (R. Vol. II, p. 28, at pp. E. 2-4):

> "(The Court) If you are not accepting a new trial, then you can answer the simple question; do you want a new trial?
>
> "(The Witness) No sir, I never wanted a new trial.
>
> * * * * * * *
>
> "Q. Is it your contention you never wanted a new trial and the position you find yourself in now is one imposed upon you by the Court? A. That's right.
>
> "Q. Do you now desire a new trial? A. No, I don't.
>
> "(Mr. Sause) If Your Honor please, apparently there has been some mistake here. The petitioner in the Post Conviction case didn't want a new trial. He doesn't want a new trial now. The State is ready, willing and able to proceed with a new trial if he desired so, but in the absence of such we request the original judgment and sentence be reinstated.
>
> "(The Court) He ought to have the right under these circumstances to take the position that he does not want a new trial. I don't think it ought to be forced on him if he doesn't want it and the original sentences—

"Q. (Mr. Sause) There is one question I would like to pose. Would you state, if you care to, your reason for not wanting a new trial? A. I feel there has been an error made and my sentence and judgment has been ruled by the Court of Appeals as null and void and it is illegal and I felt that if it was illegal I could get out free without having to stand a second trial, and that is one of my reasons for not wanting a new trial.

* * * * * *

"Q. And at this time you are telling His Honor you do not want a new trial? A. I don't want a new trial and never have wanted one in this case.

"(Mr. Sause) We request the original judgment and sentence in indictments 446 and 1023 be reimposed.

"(The Witness) I object.

"(The Court) If you do not want a new trial, I have no alternative except to reimpose the sentences.

"(The Witness) If the Court is informed the sentence and judgment is void and ruled so by the Court of Appeals I would be placed back in the penitentiary on an illegal sentence.

* * * * * *

"(The Witness) I never wanted a new trial and never wanted that sentence on it. Whether the Court rules the sentence is legal and if I have to stay, I'll stay, but the Court rules the sentence is illegal and that I am entitled to release because of not being given a fair trial, then I want the release.

"(The Court) The only way you can get a release is to submit to a new trial and be found not guilty.

"(The Witness) Well, I don't want a new trial.

"(The Court) In indictment 446 of the docket of 1957, the sentence is fifteen years in the Maryland Penitentiary. In indictment 1023 of the docket of 1957, the sentence is twenty years in the Maryland Penitentiary to run consecutively, dating from January 27, 1957."

* * * * * *

This unequivocal position with regard to a new trial is also present in the petition filed in the District Court below (R. Vol. I, pp. 2-17), as was found by Judge Winter (*infra*, p. 36a).

The Maryland Court of Appeals noted parenthetically that "we might infer from some of his testimony that he feared a heavier sentence or at least no more favorable result" (*infra*, p. 34a); but whatever the reason, it is clear from the record that up to and including the time that he appeared before the court for rearraignment on March 23, 1962, Ruckle did not desire a new trial.*

(b) *The double jeopardy imbroglio*

Implicit in the majority opinion below is the fact that, to whatever degree he has been won over to the idea of a new trial, Ruckle has been strongly influenced by the suggestion by the court (*infra*, p. 41a) and his counsel (*ibid*, footnote) that he will at last have a forum in which to present his double jeopardy contention. This apparent attempt to sugarcoat the prospect of a new trial presents a baseless and (albeit unwitting) cruel hope of success to the prisoner.

The Fourth Circuit, in the same opinion that it states that "We are not called upon in this proceeding to con-

---

* There are also, of course, strong overtones of abandonment and waiver of whatever request for a new trial may have appeared to be present in Ruckle's requests for relief. See, Judge Winter's opinion below (*infra*, p. 37a) and the opinion of the Maryland Court of Appeals (*infra*, p. 34a). The Maryland trial court found, and the quoted testimony supports that conclusion, that there had never been any requests for a new trial. Thus, argument surrounding waiver stems only from a possible legal situation wherein a request for a new trial would be conclusively implied in any request by a petitioner for collateral relief. See the discussion by the Maryland Court of Appeals that the award of a new trial by the state Post Conviction judge was merely an offer of "the only remedy then available . . ." — *infra*, p. 34a.

sider the merits of such a plea [of double jeopardy]" — *infra*, p. 41a — expresses its own belief as to its untenability (*infra*, p. 40a): "We agree with the state's contention that when the defendant's original trial was declared a nullity, he did not automatically become entitled to release; he was still subject to retrial." His counsel apparently shares this view (*infra*, p. 42a, footnote).

But, still more to the point, the Maryland Court of Appeals has already ruled that the plea of double jeopardy is not available to Ruckle. This was the flat holding in his application for leave to appeal from the granting of Post Conviction relief. 220 Md. 683, 155 A. 2d 69; *infra*, pp. 20a-21a. In the later appeal to the Maryland Court, it was held that "The holding [in 220 Md., *supra*] that he was not entitled to release had become the law of the case." 230 Md. 580, 187 A. 2d 836; *infra*, p. 34a.

Therefore, while professing to leave open the question of the plea of double jeopardy, the net (and *only*) effect of the opinion of the Fourth Circuit is to subject Ruckle to a new trial. While it might be that he would accept a new trial as a vehicle for asserting his double jeopardy plea, even the majority opinion below does not go so far as to suggest that he desires a new trial wherein the making of such a plea is foreordained futility.

(c) *Conflict with State decision.*

The Fourth Circuit Court of Appeals has thus decided an important state question in a way in conflict with applicable state law. The Court of Appeals of Maryland held that the State was not obliged to force Ruckle to undergo a new trial. 230 Md. 580, 187 A. 2d 836; *infra*, pp. 32a-34a. See also, *infra*, pp. 27a-29a. The majority opinion of the Fourth Circuit Court of Appeals holds that Maryland

must require the prisoner to undergo a new trial — even to the point of entering a not guilty plea if he refuses to enter a plea of his own (*infra*, pp. 38a-41a).

(d) *Prisoner placed in double jeopardy*

Although not valid for the purpose asserted by Ruckle, the question of double jeopardy does have a place in this proceeding.

This Court has ruled that the question of double jeopardy in state proceedings does not involve federal constitutional issues. *Palko v. Connecticut*, 302 U.S. 319, 82 L. Ed. 288, 58 S. Ct. 149. However, it has been held — and recognized by Maryland's highest Court in the instant case, *infra*, p. 34a — that after a seasonable abandonment, or attempt to abandon, a motion for a new trial, a new trial may not be forced on a defendant. *People v. McGrath*, 202 N.Y. 445, 96 N.E. 92. See also, *People v. Craven*, 65 N.Y.S. 2d 748, aff'd 70 N.Y.S. 2d 513; *State v. Pitts*, 57 Mo. 85; *State v. Brannon*, 55 Mo. 63; *Grisham v. The State*, 19 Tex. Cr. App. 504, 515. This is based upon double jeopardy considerations.

Even assuming that the federal courts, under the *Palko* doctrine, will not involve themselves with questions of double jeopardy in state courts, it is anomalous — and clearly a distinguishable matter — when the effect of an order of a federal court is to place a defendant in double jeopardy. Here, Ruckle's insistence that he does not desire a new trial and the possibility that upon a retrial and conviction he may receive a death sentence or longer prison sentence gives added undesirability to the result.

CONCLUSION

The significance of the entire case is well seen in this exchange between the state trial court and the prisoner at the rearraignment proceeding on March 23, 1962 (quoted *supra*, p. 10):

> "Q. Is it your contention you never wanted a new trial and the position you find yourself in now is one imposed upon you by the Court? A. That's right."

Finding strong support for this position in the record (see, e.g., pp. 30a-31a); the trial court felt that the courts of Maryland should not (indeed, could not) require the prisoner to accept a new trial — particularly where the consequences could be the imposition of the death penalty or a substantially greater sentence. In this, the Court of Appeals of Maryland, the District Court, and one Fourth Circuit judge agreed.

If the State of Maryland as a matter of federal constitutional law must require a prisoner either as an incident to taking cognizance of collateral attack upon a conviction or under an illusory assurance that it will serve as a vehicle for making the contention which is the prisoner's only object — this result is both an important federal matter not heretofore passed upon by this Court and an important question of state law which has been decided by the Fourth Circuit Court of Appeals in a way in conflict with the applicable law of Maryland. Supreme Court Rule 19.

For all of these reasons, but particularly to define the scope of the state's power to require a defendant to under-

go a new trial, the Petitioner urges that this Court grant the writ of *certiorari* herein prayed.

Respectfully submitted,

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APPENDIX A

Opinions of Courts and Judgment Below

1.

Midgett v. State

Court of Appeals of Maryland

Decided March 4, 1958

216 Md. 26, 139 A.2d 209

Horney, J., delivered the opinion of the Court.

This is an appeal by Curtis Edward Midgett, (Midgett or the defendant), who was convicted by a jury in the Criminal Court of Baltimore (Warnken, J.) of armed robbery and kidnapping and was sentenced to consecutive terms in the Maryland Penitentiary of twenty years for armed robbery and fifteen years for kidnapping, a total of thirty-five years. The defendant was tried jointly with Morris Ruckle, (Ruckle), and John Davis, (Davis), on separate indictments for armed robbery and similar offenses, and a joint indictment for kidnapping. Davis who was convicted of both offenses and was sentenced to a total of fifteen years, did not appeal. Ruckle, who was also convicted of both crimes and was also sentenced to a total of thirty-five years, appealed, but subsequently dismissed his appeal.

In substance the defendant was charged in the first count of the indictment with armed robbery by feloniously robbing Charles W. Zeller, a police officer, with a dangerous and deadly weapon, and violently stealing the police officer's service revolver, police belt and holster, and flashlight, having a total value of $76.98. The indictment also charged the defendant with five other offenses in six counts, but all except the first count were abandoned by the State at the close of all the evidence.

The kidnapping indictment charged the defendant with feloniously, forcibly and fraudulently "* * * [carrying] and * * * [causing] to be carried within this State a certain per-

son, to wit, Charles W. Zeller, with intent to have [him] carried within this State."

The State adopted the statement of facts prepared by counsel for the defendant as substantially correct. We shall do likewise insofar as we deem it necessary for the purpose of this decision. A comparison of the summary of facts in the brief with the record demonstrates its complete accuracy.[1]

The defendant and Ruckle came to Baltimore from Chester, Pennsylvania, on January 15, 1957, for the purpose of robbing the White Coffee Pot Restaurant. They enlisted the aid of Davis, and together they drove around Baltimore in Ruckle's automobile making plans for the hold-up by observing the movements of the supervisor who collected the receipts from the various restaurant sites. All three drove back to Chester and returned to Baltimore the next day in the defendant's automobile, at which time they made further exploratory observations. They decided to go to the main office or commissary of the chain of restaurants on Frederick Avenue to determine whether the supervisor had brought the money there, and if so, to rob him in the office. They turned off Frederick Avenue into Landwehr Lane, a small street or alley behind the restaurant office, and pulled into a parking area. The defendant and Ruckle got out of the automobile and walked around to the front of the restaurant's office; but, being unable to determine if the money was there they returned to the automobile. It was then approximately 11:30 P.M., and, as they reached the automobile, they saw the headlights of another automobile coming down the alley. The defendant got back in his automobile but Ruckle, when he saw it was a police car, crouched down on the other side of the automobile.

The sole occupant of the police car was Officer Charles W. Zeller, (Officer Zeller *or* officer), who stopped his car, came over to the defendant and asked him what his busi-

[1] We commend the learned court-appointed counsel for the overall excellence of his brief for the defendant, which has furnished us with unusual assistance.

ness was there. The defendant got out of his automobile and replied that they were just leaving. The officer asked to see the defendant's registration card. The card was shown. But, the defendant, who did not have an operator's license with him, volunteered that he was not driving, and that the other man was. In the meantime, the officer was shining his flashlight in all directions, and he asked the defendant where the other man was whom the officer had seen walking up the alley. The defendant replied that he was relieving himself. The officer then started around to the other side of the defendant's automobile and, as he cleared the bumper, he encountered Ruckle. The testimony of the officer at this point is vivid: "[Ruckle] jumped up from the right side of the automobile * * * and shoved a long barrel 38 pistol at me and said, 'Officer, don't move or I will kill you.' At that time I went for my gun and he said, 'Don't pull that gun out.' So I put my hands up in the air when he threatened me, and my one hand went in the air and one hand went in my pocket * * *." The defendant was behind the officer as Davis got out of the automobile. The officer began backing up and kept "hollering all the time, 'Don't shoot, you can have the gun.'" When the officer backed up to the wall, "he put his hand down real quick to the gun" and the defendant walked between the officer and Ruckle and moved the officer's hand away from the revolver. The officer admitted on cross-examination that he "kept an idea of trying to pull * * * [his] hand down to * * * [his] gun before they took it away from * * * [him]." Ruckle then directed the defendant to get the officer's revolver but he could not get it out of the holster. In order to get the revolver, Davis and the defendant removed the officer's coat and with the officer's help succeeded in getting the belt and holster off with the revolver in it. The defendant then took the "gunbelt, nightstick, flashlight all was together, or whatever it was, and put it in the front of the car." The defendant was unable to get the revolver out of the holster because of a spring which he did not know how to work. He testified that he would not have taken the gunbelt and holster had he been able to remove the revolver from the holster. The officer

pleaded with the man to take his revolver and let him go, but Ruckle replied: "You have caught us in a big act, we have got to take you with us."

The officer was placed in the defendant's automobile. Before they drove off, Davis went over to the police car, took the keys out of the ignition switch and threw them away. They drove out the Washington Boulevard towards Washington, looking for a place to tie up the officer and leave him, until they came to a point about ten miles out of Baltimore when they pulled into a road near a farm house, stopped and tied the officer's hands and legs with rope. The officer testified that before he was taken out of the automobile Davis asked him how much money he had. When informed that the officer had a dollar, Davis stated: "I love to rob a policeman, I think I will take the dollar." The officer told Davis he could have it, but he replied: "No, I won't take it." According to the officer, Davis then called attention to the officer's watch but "he decided not to take * * * [it]." The officer was then taken from the automobile and was left tied to a tree near the farm house. The only articles taken from the officer were his belt, holster, revolver and flashlight. All of these items, except the flashlight, were subsequently recovered and offered in evidence. The robbery indictment charged the defendant only with the larceny of the items enumerated.

After leaving the officer, the defendant and his companions drove towards Washington. After going about two miles they turned around and drove past the place where they tied up the officer, who in the meantime had freed himself. It was at this time and in this vicinity that Ruckle finally succeeded in freeing the revolver from the holster. He threw the belt and holster out the window and down a bank alongside the highway. They then proceeded again in the direction of Washington. When they got near Silver Spring Ruckle got out of the automobile, took his own revolver and the officer's and hid both in a woods off the highway. At Silver Spring Ruckle left the automobile and Davis and the defendant proceeded to the outskirts of Washington, where Davis got out, boarded a bus and re-

turned to Baltimore. The defendant drove into Washington alone, stopped for gas and found the officer's flashlight under the front seat of his automobile. He threw it out the window on a street in Washington and drove back to Chester. In the meantime, Ruckle telephoned from Silver Spring to his brother in Chester, who drove to Silver Spring with an uncle to pick up Ruckle. Before leaving Silver Spring Ruckle recovered the revolvers he had hidden and took both back to Chester. For a short period of time the uncle, at Ruckle's request, kept the officer's revolver under the mattress of his (the uncle's) bed. A day or two later the defendant called on Ruckle in Chester, at which time Ruckle gave the officer's revolver to the defendant and told him to throw it in the river. The defendant took the revolver, left Chester and drove south. Near Wilmington he hid it on a side road and proceeded to Florida. The revolver was recovered from some shrubbery in Claymont, Delaware, where the defendant had hidden it.

During the course of the trial, the defendant became involved in a dispute with his court-appointed counsel concerning certain aspects of his defense, including the right of removal of the trial outside of Baltimore City. The defendant prepared a letter to the trial judge, setting forth in some detail the nature of the disagreement between himself and his counsel, wherein he appealed to the judge for permission to question any and all witnesses personally and above all to have Officer Zeller return to the witness stand. He had the note passed up to the Bench while the State was still putting on its case. The judge did not read the letter. Subsequently, when the defendant took the witness stand in his own behalf he proceeded to berate his counsel for refusing to ask questions of the State's witnesses on cross-examination, particularly the officer, and for not withdrawing from the case so that he could personally ask the questions he wanted asked. The trial judge promptly intervened in the controversy, and following the colloquy which then ensued between the court and the defendant, handed the letter to the defendant's counsel without reading it and instructed counsel to proceed.

At the close of all the evidence the defendant moved for a directed verdict on both the robbery and kidnapping charges. Both motions were refused. After the arguments of counsel on both sides, the trial court orally gave its advisory instructions to the jury on both charges. The defendant excepted to the instructions with respect to the charge of kidnapping (i) because "kidnapping" was not properly defined, (ii) because the indictment did not charge the crime of kidnapping, and (iii) because the indictment was silent as to an "intent to conceal the policeman". The defendant did not specifically except to the court's instruction as to the "standstill" kidnapping. And no question as to the failure of the indictment to charge the crime of kidnapping was raised on appeal.

The jury retired to consider its verdict at 3:34 P.M. It did not return with a verdict until 6:32 P.M. In the meantime, the defendant, and his co-defendants, were removed from the courtroom and confined in the lockup in the basement of the court house, where they remained until the jury returned to annonce its verdicts. After the jury retired to deliberate, the court proceeded to hear and dispose of other matters. While so engaged the bailiff or clerk handed the court a note from the foreman of the jury which stated in substance: "If found guilty of kidnapping can we be assured the death penalty will not be given?" Counsel for the defendant was absent at the time, as was the defendant, whereupon the court wrote on the note the word "Yes" and returned it to the jury. The jury continued its deliberations, and after the lapse of a considerable period of time, the note was again sent to the court with substantially the following question: "Can verdict be stated guilty of kidnapping with assurance of no death penalty?" On this occasion counsel for all of the defendants, but not the defendants themselves, were present, and the court showed them the whole note. Thereupon, the court wrote in substance the following answer and again returned the note to the jury: "If verdict is guilty, death sentence will not be imposed." The jury then came in with a verdict of guilty on both charges. After the second note had been submitted to the court, and while the defendant was still

absent, the trial judge dictated the following statement into the record: "The jury had sent a note to me in * * * [the kidnapping case]. Can we find a verdict of guilty with assurance of no death sentence and I have written on there, yes. Is that agreeable to you all?" Obviously, the words "you all" referred to counsel for all of the defendants. If counsel made a reply to the court's question, it was not recorded by the reporter. After the verdicts had been received the court advised the jury, among other things, to the effect that the matter of punishment did not concern the jury, and reminded it that the Assistant State's Attorney had advised it in his argument that the State was not seeking capital punishment and that in all probability the judge would not impose such sentence.

The defendant contends: (i) that his motion for a directed verdict on the charge of robbery should have been granted; (ii) that the jury was incorrectly instructed on the law applicable to the charge of kidnapping; (iii) that it was reversible error for the trial court, in the absence of counsel, to answer a question propounded by the jury after it had retired and was still deliberating; (iv) that it was reversible error for the trial court, in a capital case, to assure and promise the jury that the death penalty would not be imposed by the court if the jury should find the defendant guilty of kidpapping; and (v) that the defendant was denied a fair trial when the trial court refused to consider the defendant's complaints as to certain disagreements between the defendant and his court-appointed counsel

We shall consider the third and fourth points or questions of law first. It is conceded that the defendant was absent from the courtroom on the two separate occasions when the trial court undertook to answer questions which had been addressed to the court by the jury. The answers were not given to the jury in open court but through an exchange of notes while the jurors remained in their jury room. It is also conceded that on the first occasion counsel for the defendant was absent; and that on the second occasion counsel was present and was informed by the court of the questions propounded and the answers thereto.

In the State there is no doubt that an accused in a criminal prosecution for a felony has the absolute right to be present at every stage of his trial from the time the jury is impaneled until it reaches a verdict or is discharged, and there can be no valid trial or judgment unless he has been afforded that right. The constitutional guarantee includes the right of the accused to be present (i) when the jury is charged or instructed on the facts, the law or the form of the verdict, before it has begun its deliberations or afterwards upon its request or by direction of the court; (ii) when the court is repeating a charge or instruction previously given in whole or in part; (iii) when the court communicates with the jury in answer to questions propounded by the jury, or (iv) when there shall be any communication whatsoever between the court and the jury; *unless* the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury. Furthermore, the right to be present is personal to the accused and cannot be waived by his counsel. *Duffy v. State*, 151 Md. 456, 135 A. 189 (1926); *La Guardia v. State*, 190 Md. 450, 58 A. 2d 913 (1948); Constitution of Maryland, Declaration of Rights, Art. 5.

In *McBean v. State*, 83 Wis. 206, 53 N.W. 497 (1892), in which the defendant was convicted of assault with intent to kill, the jury, after it had retired, upon inquiring whether it could depend on clemency on finding a verdict of guilty, was sent a reply that it could. The jury found the defendant guilty and recommended mercy. The Supreme Court of Wisconsin, in reversing the judgment held that:

> "The error consists of the promise made by the trial judge to the jury, to the effect that, if they found McBean guilty they might rely upon him to extend the clemency of the court to the prisoner. * * * The promise thus secured was well calculated to overcome reasonable doubts and coerce an agreement for conviction. It was an unauthorized interference with the deliberations of the jury."

A similar decision was reached in *State v. Kiefer*, 16 S.D. 180, 91 N.W. 1117 (1902); See also *Lovely v. United States*, 169 F. 2d 386 (4th Cir. 1948); *Demetree v. United States*, 207 F. 2d 892 (5th Cir. 1953); *Territory v. Griego*, 8 N.M. 133, 42 P. 81 (1895); *State v. Kernan*, 154 Iowa 672, 135 N.W. 362 (1912); *State v. Sweat*, 159 La. 769, 106 So. 298. (1925); and *State v. Douget*, 177 La. 63, 147 So. 500 (1933). In *Shields v. United States*, 273 U.S. 583 (1927), it was held that it was reversible error for the judge, without giving notice to the defendant, to send a written instruction to a jury, that had been unable to reach a verdict, that it must find the defendant guilty or not guilty. And see *Strasheim v. State*, 138 Neb. 651, 294 N.W. 433 (1940), in which the "instruction" contained little more than a sharp reprimand by the court for the jury's hesitation in arriving at a verdict, a reminder of its immunity from outside influence, its supremacy in the matter, and a request for an early unanimous verdict. However, the conviction was set aside on the ground that the constitutional and statutory rights of the defendant to a jury trial were violated when the court, without notice to, and in the absence of, the defendant and his counsel, instructed the jury orally while it was deliberating upon a verdict.

For the reasons stated, the judgments and sentences of the lower court must be reversed.

Since the judgment and sentence must be reversed as to Midgett and a new trial ordered, we deem it to be necessary and desirable for the guidance of the lower court and to avoid the expense and delay of another appeal to this Court to decide the points or questions of law raised by the objection to the instructions on the law applicable to the charge of kidnapping, and by the refusal of the motion for a directed verdict on the charge of robbery. See Maryland Rule 885 (Scope of Review).

On the objections to the instructions on the law applicable to the charge of kidnapping, we think it is clear that the instructions were not only misleading and confusing, but were particularly ambiguous with respect to the distinction between kidnapping and false imprisonment.

At common law, the offense of kidnapping was the forcible abduction or stealing away of a person and sending him into another country. It was regarded as an aggravated form of false imprisonment, since it embraced all of the elements of that offense, with the *additional* element of carrying the victim out of his own country and beyond the protection of its laws." (Emphasis added.) 1 *Wharton, Criminal Law and Procedure*, Sec. 371 (1957). See also 2 *Bishop, Criminal Law*, Sec. 750 (9th ed. 1923); *Hochheimer, Law of Crimes and Criminal Procedure*, Sec. 317 (2d ed. 1904). Although at common law, the accused had to carry the person kidnapped into *another country* before he was subject to prosecution for kidnapping, statutes concerning the offense in this country have usually provided that both *intra-state* as well as *inter-state* kidnapping are felonies and severely punishable. See Code (1951), Art. 27, sec. 403. False imprisonment, which is punishable as an aggravated assault, is merely the unlawful detention of a person against his will. *Clark and Marshall, Treatise on the Law of Crimes*, Sec. 220 (5th ed. 1952); *Hochheimer, op. cit. supra*, Sec. 316. Although false imprisonment in most states is punishable by statute, it is a common law offense, and, in the absence of a statute, is punishable as such, as it is in this State. For a discussion of the distinction between false imprisonment and kidnapping see *Smith v. State*, 63 Wis. 453, 23 N.W. 879 (1885). See other discussions in *Click v. State*, 3 Tex. 282 (1848), and *Keith v. State*, 120 Fla. 847, 163 So. 136 (1935), and the dictum in *Vandiver v. State*, 97 Okl. Cr. 217, 261 P. 2d 617 (1953), to the effect that the mere taking of a woman into an automobile without driving away would not be kidnapping.

Statutes in many states, but not in Maryland, tend to obliterate the distinction between the two offenses. Thus, detention for certain specified purposes, such as robbery, extortion, revenge, money, or a reward, which had formerly been considered false imprisonments, have been included in the definition of kidnapping. Some states have gone further and have provided that any seizure of a person with the mere intent secretly to confine or imprison him,

or to hold or detain him against his will, would constitute kidnapping.[2] Art. 27, sec. 403, *supra*, provides:

> "Every person, * * * who shall be convicted of the crime of kidnapping and forcibly or fraudulently carrying or causing to be carried out of or within this State any person, * * * with intent to have such person carried out of or within the State, or with the intent to have such person concealed within the State or without the State, shall be guilty of a felony * * *."

Obviously, this State has not abolished the distinction between false imprisonment and kidnapping. Indeed it has adopted the basic common law concept that to constitute kidnapping there must be a *carrying* of the person from the place where he is seized to some other place either out of or within this State. The statute also specifies that there must be an *intent to carry* such person to such other place or, in the alternative, an *intent to conceal* such person in or out of this State. As we have previously indicated, the failure to distinguish between false imprisonment and kidnapping, which resulted in the erroneous instruction to the effect that the officer did not have to be carried from the place where he was seized — which constituted the so-called charge of a "standstill" kidnapping — was not only entirely unnecessary, but was clearly improper under the indictment and the proof.

Since the indictment in this case charged the defendant with *carrying* the seized officer, *with intent to have him carried*, but did not charge the defendant *with intent to have him concealed*, it is clear that any reference in the charge or instruction to the word "concealed" could have the effect of misleading and confusing the jury and was highly prejudicial to the defendant. In the case of *State v. Altemus*, 76 Kan. 718, 92 P. 594 (1907), in which the defendant was indicted for kidnapping under a statute which contained a number of cumulative and alternative

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[2] See Note, "A Rationale of the Law of Kidnapping", 53 Colum. L. Rev. 540 (1953).

elements, among which was "inveigling or decoying", in addition to other elements, the indictment charged "inveigling and decoying", but there was no proof of those elements. In reversing the conviction because of error in the trial court's instructions to the jury, the Court said:

> "It seems that the evidence does not justify any instruction in regard to inveiglement and decoying. These elements of the crime are charged, but are not supported by any evidence. 'An instruction ought not to be given, although it is a correct statement of the law in the abstract, which is not applicable to the facts that are in evidence.'"

A fortiori an abstract instruction ought not to be given where it is not applicable to the offense charged in the indictment.

In a civil case the granting of a prayer, which is calculated to be misleading although it contains an otherwise correct abstract statement of the law, is reversible error. *Wash. Fire Ins. Co. v. Davison*, 30 Md. 91 (1869); *B. & O. R. R. v. Boyd*, 67 Md. 32, 10 A. 315 (1887). It is also reversible error to give an instruction on a particular issue unless such issue is presented by the pleading and proof. *Ritterpusch v. Lithographic Plate*, 208 Md. 592, 119 A. 2d 392 (1956); *Wintrobe v. Hart*, 178 Md. 289, 13 A. 2d 365 (1940). In the *Wintrobe* case, *supra*, we distinguished between an instruction which is merely erroneous but at least instructs and a misleading and confusing instruction which does not instruct at all. The erroneous though instructive instruction may not be reversible when it appears that the opposite party was not injured. But, as we said, at p. 296: "* * * instructions which are ambiguous, misleading, or confusing to jurors can never be classed as non-injurious." We hold that this is especially true in a criminal case where the jury is the judge of both the law and the facts and the instruction is merely advisory. We reiterate that the erroneous definition of kidnapping coupled with an irrelevant reference to an intent to "conceal" the officer, made the instruction misleading and confusing and clearly prejudicial by diverting the mind of the jury

from the single charge of carrying with an intent to "carry", and directing its attention to the more aggravated element of the offense of kidnapping with which the defendant was not charged.

On the refusal of the motion for a directed verdict on the charge of robbery, we think it is clear that the refusal of the trial court to grant the motion was proper. Under the Constitution of this State, Art. XV, sec. 5, we have the right and duty, when a question is properly submitted, to pass upon the legal sufficiency of the evidence in a criminal case. The question here is whether the evidence produced is sufficient to show either directly or by a rational inference that the defendant had an intent to *steal* when he participated in the "taking and carrying away". While it is true there can be no robbery without a larcenous intent, such intent may be ascertained and determined from the words, acts and conduct of the accused. 77 *C.J.S., Robbery*, Sec. 22. In the case now before us, there is evidence that the defendant and his co-defendants took and carried away the officer's service revolver, police belt, holster and flashlight at the same time they carried the officer away, when they might have left the officer's equipment — particularly the flashlight which they never needed to disarm him — in the police car if they had no intent to steal the equipment or any part of it. Although some of the property taken was finally discarded, the revolver was subsequently recovered by Ruckle from the place it had been concealed and was eventually given to the defendant, who took it and hid it where he could easily recover it. Of course, an intent formed subsequent to the taking is immaterial, but subsequent appropriation is a circumstance to be considered, along with all other relevant facts, in determining the existence of an intent to steal at the time of the initial taking.

We believe that under the evidence in this case the question of the intent of the defendant is peculiarly a jury question. In this State, where a jury is the judge of both the law and the facts in a criminal case tried by a jury, the weight of the evidence, or whether the State has proven its case beyond a reasonable doubt, are matters which the jury

should determine. *Yanch v. State*, 201 Md. 296, 93 A. 2d 749 (1953); *Dodson v. State*, 213 Md. 13, 130 A. 2d 728 (1957); *Daniels v. State*, 213 Md. 90, 131 A. 2d 267 (1957).

In *Rex v. Holloway*, 5 C. & P. 524, 172 Eng. Rep. 1082 (1833), the accused was indicted for stealing a gun by force from the prosecuting witness who was one of the gamekeepers of the manor of Deconsfield. The gamekeeper, having met the accused and another man, whom he knew to be poachers on a part of the manor, seized the accused. The other man rescued the accused, whereupon the accused wrested the gun from the gamekeeper and ran away with it. There was evidence to the effect that the next day the accused was heard to say that he would sell the gun. The gun was never recovered. The case was tried before a jury. The trial judge in summing up instructed the jury that the accused "might have imagined that the * * * [gamekeeper] would use the gun so as to endanger his life; and, if so, his taking it under that impression would not be felony; but if he took it intending at the time to dispose of it, it would be felony. * * * It is a question peculiarly for your consideration."

In *Bailey v. State*, 92 Ark. 216, 122 S.W. 497 (1909), the Court held that there was sufficient evidence from which it could have been found that there was no intent to steal the revolver, but also said that whether there was *an intent to steal* was a jury question.

In *Mahoney v. State*, 33 Tex. Crim. 388, 26 S.W. 622 (1894), the defendant escaped from prison by disarming a guard, tying him up and fleeing with his pistol. The defendant testified that he intended to return the weapon to the guard, but he sold it instead, so that there was a question as to whether the defendant was telling the truth.

Since there was evidence before the jury in the instant case, which, if believed, would sustain a conviction for armed robbery, the motion for a directed verdict was properly refused.

We are unable to conclude that the error in instructing the jury in the kidnapping case out of the presence of the

defendant was not also an unauthorized interference with the deliberations of the jury in the robbery case. When the robbery charge is retried there should be a specific instruction to the jury on the question of the intent to steal. Apparently, the issue was not raised at the original trial, but when the charge of robbery is retried, the trial judge should instruct the jury to the effect that, if it finds that the defendant, by taking and carrying away the equipment of the officer, intended to steal it, then the verdict should be "guilty", but, if it finds that he merely intended to disarm the officer, without an intent to steal his equipment at the time it was taken and carried away, then the verdict should be "not guilty".

In making this decision we have not overlooked the cases cited by the defendant, including *Fortenberry v. State*, 190 Miss. 729, 1 So. 2d 585 (1941); *Bailey v. State*, 139 Tex. Crim. 260, 139 S.W. 2d 599 (1940); and *Jones v. Commonwealth*, 172 Va. 615, 1 S.E. 2d 300 (1934),[3] and the case of *United States v. Durkee*, 25 Fed. Cas. 941, No. 15,009 (C. C. N. D. Calif. 1856), not cited by either party.

Since there is to be a new trial on both the robbery and kidnapping charges, there is no reason for us to consider the fifth and final question raised by the defendant as to his complaints against the attorney who represented him at the trial in the lower court.

Judgments and sentences reversed, and a new trial is hereby awarded on both the robbery and kidnapping charges; the Mayor and City Council of Baltimore City to pay the costs.

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[3] The cases of *State v. Morris*, 96 W. Va. 291, 122 S.E. 914 (1924), *Butts v. Commonwealth*, 145 Va. 800, 133 S.E. 764 (1926), and *Southerland v. Commonwealth*, 217 Ky. 94, 288 S.W. 1051 (1926) were either not in point or were distinguishable for other reasons.

2.

State of Maryland v. Morris Ruckle

Criminal Court of Baltimore

Decided May 13; 1959

Unreported.

Upon filing by Morris Ruckel of his petition for relief under the Post Conviction Procedure Act of Maryland, the court appointed Joseph C. Finnerty, Esq., of the Baltimore City bar as counsel for the petitioner. The petition was duly answered by the State's Attorney for Baltimore City, and at the hearing in open court, the petitioner informed the court that he did not want to be represented by Mr. Finnerty or any other attorney. He also requested the court to release Mr. Finnerty from further participation in the case, and permit the petitioner to present his case to the court in his own behalf. This request was granted.

The petitioner was indicted jointly with one, John R. Davis, and one, Curtis E. Midgett, for kidnapping one Charles W. Zeller, a police officer, and each of those three men were indicted separately on a charge of robbery of the said officer with a deadly weapon and violently stealing his service revolver and other equipment. All of the cases were tried at the same time before a jury in the Criminal Court of Baltimore with the result that all of the defendants were convicted of both of the charges of kidnapping and robbery. Motions for new trials were never perfected, and in due course sentences were imposed by the court. The petitioner was sentenced to imprisonment for a total of thirty-five years. Midgett was sentenced to a similar term; and Davis was sentenced to a total of fifteen years in prison. Davis did not enter an appeal to the Court of Appeals; but appeals were entered on behalf of the petitioner and Midgett by their attorney who was appointed by the court. Subsequently the petitioner dismissed his said attorney and personally withdrew his appeal.

The Court of Appeals reversed the judgments and sentences against Midgett, and awarded to him a new trial for the reasons set forth in the court's opinion which is reported in 216 Md., pg. 26.

During the trial in the lower court the jury had propounded by written memoranda to the court two questions, and on each of the two occasions, the court had sent answers in writing to the jury, but none of these things occurred in the presence of the defendant, Midgett, or the other two defendants whose cases were being tried at the same time. In regard to this matter, the Court said, *inter alias* as follows:

> "In this State there is no doubt that an accused in a criminal prosecution for a felony has the absolute right to be present at every stage of his trial from the time the jury is impaneled until it reached a verdict or is discharged, and there can be no valid trial or judgment unless he has been afforded that right. The constitutional guarantee includes the right of the accused to be present (i) when the jury is charged or instructed on the facts, the law or the form of the verdict, before it has begun its deliberations or afterwards upon its request or by direction of the court; (ii) when the court is repeating a charge or instruction previously given in whole or in part; (iii) when the court communicates with the jury in answer to questions propounded by the jury, or (iv) when there shall be any communication whatsoever between the court and the jury; unless the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury. Furthermore, the right to be present is personal to the accused and cannot be waived by his counsel. Duffy v. State, 151 Md. 456, 135 A. 189 (1926); La Guardia v. State 190 Md. 450, 58 A. 2d 913 (1948); Constitution of Maryland, Declaration of Rights, Art. 5."

A person may waive his constitutional right, and this may be done by his failure to enter a timely appeal or assert such right in an appeal that has been taken.

In *Beard v. State*, 216 Md. 302, at 312, the Court of Appeals of Maryland said:

> "The scope of a waiver may be broad, and a waiver may extend to constitutional rights, including those relating to criminal proceedings. Authorities on this subject are legion. It will suffice to refer to Diaz v. United States, 223 U.S. 442, 56 L. Ed. 500, 32 S. Ct. 250, in which it was held that the right of confrontation of witness could be and had been validly waived."

The following extract is from the opinion of the Court of Appeals in the case of Jackson v. Warden, 218 Md. (Advance Reports) 652, viz:

> 'We may assume arguendo, the Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, required that Jackson be given the transcript for use in his motion for a new trial. Nevertheless, it seems clear that he abandoned that constitutional right when he failed to rely on it or assert it in his appeal, and that this was a waiver of the chance to have the right passed on and restored to him by this Court, or the Supreme Court on certiorari if this Court refused. The decisions make it plain that habeas corpus is available only to protect constitutional rights that have not been waived, and that relinquishment of a known right, either in the trial court, or on review, precludes relief in subsequent habeas corpus proceedings if the judgment complained of was not a nullity.
>
> "In countless cases (one of which was Winegard v. Warden, 194 Md. 699, certiorari denied, 339 U.S. 938 (1950), in which unconstitutionality of the statute violated was alleged on habeas corpus), we have said that habeas corpus is not a proper remedy when an appeal is or was available to raise the point relied on and the judgment was not a nullity. The writ cannot be used in lieu of appeal 'to correct errors committed in the course of a trial, even though such errors relate to constitutional rights.' United States v. Rosenberg, 200 F. 2d 666, 668 (2nd Cir., 1952), certiorari denied,

345 U.S. 965 (1953). See, too, Brown v. Allen, 344 U.S. 443, 486, 97 L. Ed. 469, 504, and cases cited, including Goto v. Lane, 265 U.S. 393, 402, 68 L. Ed. 1070, where it was said: 'If the questions presented involved the application of constitutional principles, that alone did not alter the rule. * * * And, if the petitioners permitted the time within which a review on writ of error might be obtained to elapse and thereby lost the opportunity for such a review, that gave no right to resort to habeas corpus as a substitute.' "

Other extracts from the court's opinion in the *Jackson* case are as follows:

"This court has held that constitutional rights may be waived."

"* * *"

"There is no doubt that the waiver of a constitutional right may come from failure to take a timely appeal or to assert the right on an appeal."

There is no doubt that if the petitioner, Ruckel, had knowledge of the transmittal of messages between the court and jury during the trial of the cases against him when he withdrew his appeal and before the expiration of time for appeal, his failure to proceed with his appeal would constitute a waiver of his rights which he now claims were violated. However, the court does not have before it any evidence that the petitioner knew of the aforesaid messages at or before the times mentioned, and for that reason the court concludes that he has not waived his asserted rights.

The petitioner contended at the hearing that he was entitled to be released immediately and finally from custody of the warden of the Penitentiary, and that granting him a new trial would not be sufficient. This is equivalent to saying that since he abandoned his appeal, he is entitled to a preferred status over Midgett, who, of course, is entitled only to a new trial. This contention of the petitioner is clearly unsound.

Section 645 A of Article 27 (1958 Supp. of Md. Code) relating to Post Conviction Procedure provides that a person convicted of a crime and incarcerated may institute a proceeding "to set aside or correct the sentence," etc. Section 645 C provides that "if the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceeding and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper."

It is the opinion of the court that the petitioner is entitled to the same relief as granted by the Court of Appeals to Midgett.

It is, therefore, on this 13th day of May, 1959, by the Criminal Court of Baltimore, ORDERED, that the judgments and sentences in the above-mentioned cases against the petitioner be, and they are hereby, set aside, and that the petitioner be, and he is hereby, granted a new trial in such cases.

JOHN T. TUCKER,
Judge.

3.

Ruckle v. Warden

Court of Appeals of Maryland

Decided October 21, 1959.

220 Md. 683, 155 A. 2d 69.

PER CURIAM.

Morris Ruckle (Ruckle), the applicant for leave to appeal, together with Charles E. Midgett (Midgett), had appealed his conviction for the robbery and kidnapping of a police officer [*Midgett v. State*, 216 Md. 26, 139 A. 2d 209 (1958)]. Ruckle subsequently dismissed his appeal before it was heard by this Court. On May 13, 1959, Judge Tucker, upon the petition of Ruckle for post conviction relief, set aside the judgment and sentence of the Criminal Court of Baltimore and granted the petitioner a new trial on the ground that he — as we had held with respect to

Midgett — had been denied his "absolute right to be present at every stage of his trial from the time the jury is impaneled until it reaches a verdict or is discharged." However, the petitioner below and applicant here contends that because he had dismissed his appeal from the invalid judgment and sentence, he was entitled to immediate and final release from custody and that granting him a new trial was not sufficient.

Judge Tucker noted that the court had authority to enter an appropriate order with respect to the judgment or sentence [Code (1958 Supp.), Art. 27, sec. 645G] and decided that Ruckle was entitled to a new trial, which was the same relief as Midgett had been granted by this Court, but not the preferred status Ruckle contended he was entitled to.

We agree with the conclusion reached by the court below.

Application denied.

4.

State of Maryland v. Ruckle

Criminal Court of Baltimore

Filed May 2, 1962

Unreported.

CARTER, J.

On March 23, 1962, Morris Ruckle appeared before this Court in re-arraignment proceedings in Indictments 446/57, charging Kidnapping, and 1023/57, charging Robbery with a Deadly Weapon. I have directed that the minutes of those proceedings be transcribed by the stenographer and filed in these proceedings and in the Post Conviction proceeding hereafter mentioned. However, since the matter has extended over a long period of time, and is quite involved, I have also decided that it is necessary to elaborate upon the views which I orally expressed at the time of re-arraignment.

The following chronology is important to an understanding of the situation on March 23, 1962:

1. May 9, 1957. Ruckle was sentenced, on verdicts of guilty returned by a jury on May 3, 1957, to 15 years in the Penitentiary on the Kidnapping charge (No. 446 57) and 20 years on the Robbery charge (No. 1023 57).

2. May 15, 1957. Ruckle entered an appeal in proper person.

3. November 21, 1957. While the appeal of Ruckle and his co-defendant, Curtis E. Midgett, was still pending, Ruckle withdrew his appeal. For reasons which will become apparent, his withdrawal of appeal is here set forth in full:

> "Now comes appellant in the above action and moves for the dismissal of the appeal therein pending for the following cause.
>
> I.
>
> "Appellant does not desire such an appeal for purposes of securing a new trial.
>
> II.
>
> "That the only issue desired by appellant to be resolved is the propriety of consecutive fifteen and twenty year sentences imposed for the several offenses arising from the one continuous crime of kidnapping.
>
> III.
>
> "That since appointed counsel raised no objection to imposition of the consecutive sentences aforesaid, and since the trial court has ignored appellant's request for belated special exception upon the issue for purposes of appeal, and it appearing that the appellate court cannot entertain the issue de novo, the only purpose of the appeal is to resolve the exceptions taken upon the trial.

CONCLUSION.

"Therefor, it appearing that appellant does not desire the appeal for a new trial, and that the of sentence is estopped for lack of exception, it is moved that said appeal be dismissed without prejudice."

4. March 4, 1958. The Court of Appeals reversed the judgments against Ruckle's co-defendant, Curtis E. Midgett. *Midgett v. State*, 216 Md. 26. Although several points were discussed, the *reversal* was based solely upon the fact that the trial court had answered a question propounded by the jury out of the presence of the defendants, Midgett and Ruckle.

5. October 10, 1958. Ruckle filed a petition (No. 41) under the Uniform Post Conviction Procedure Act. Under the heading "Conclusion," the Petition stated:

"Good Cause being shown, it is prayed that the petition be granted, the judgments complained of declared void, and *Defendant discharged to his freedom without further jeopardy.*" (Emphasis supplied.)

6. May 13, 1959. Ruckle discharged his court-appointed counsel; and a hearing was held in open court, after which Judge Tucker rendered an opinion, the pertinent portion of which was as follows:

"There is no doubt that if the petitioner, Ruckle, had knowledge of the transmittal of messages between the court and jury during the trial of the cases against him when he withdrew his appeal and before the expiration of time for appeal, his failure to proceed with his appeal would constitute a waiver of his rights which he now claims were violated. However, the court does not have before it any evidence that the petitioner knew of the aforesaid messages at or before the times mentioned, and for that reason the court concludes that he has not waived his asserted rights."

Ruckle was granted a new trial which, as Judge Tucker noted, was "the same relief as granted by the Court of Appeals to Midgett."

7. May 25, 1959. Ruckle filed an application for leave to appeal from Judge Tucker's decision of May 13, 1959. In his application, he stated, *inter alia:*

> . . . the petition specifically asked that the judgments complained of be declared void, and that a discharge be ordered granting freedom without further jeopardy. (page 3)
>
> * * * * * *
>
> To justify the order of a new trial *over* the vigorous protest of the petitioner, the court refers to section 645G. . . . (page 4)

Under the heading "The Court was Without Authority too (sic) order a new Trial," he states:

> "At the hearing of his petition on May 8, 1959, petitioner read to the Court a prepared statement to clarify his position with respect to the petition in part as follows:
>
> 'I want the record to clearly show my position on the subject of re-trial. The post conviction act provides that, quotes, "the petition shall clearly state the relief desired," unquotes. In this case the petition clearly states the relief desired is release from imprisonment without further jeopardy. There is "no request for a new trial, and I vigorously oppose even the suggestion of such a disposition as being not only contrary to my wishes, but as being untenable in light of the Constitutional bar to double jeopardy. In substance the petition alleges the judgments are void because of the invasion by the trial court of certain of the petitioner's absolute Constitutional rights and guarantees. If the charges are true, the very jurisdiction of the trial court was lost, and a release is mandatory by law. If the charges are not true, the petition should be denied".'

"From the above quote, it is emphatically clear that the court did not 'grant' the new trial in this case, but that it *ordered* the new trial over the well expressed objection of the petitioner."

And, he also observed: "Nor is it clear how the Court reaches the conclusion that a new trial is 'relief' to the petitioner, or a finding in his 'favor'."

He expressed what developed at the hearing before me on March 23, 1962, to be the crux of his objection to a new trial at page 7 of the application for leave to appeal:

> The possible penalty involved here is death, and it is the second jeopardy of this fate which Judge Tucker has ruled he must face . . .

8. October 21, 1959. The Court of Appeals denied the application for leave to appeal. *Ruckle v. Warden*, 220 Md. 683, noting:

> "Judge Tucker . . . decided that Ruckle was entitled to a new trial, which was the same relief as Midgett had been granted by this Court, but not the preferred status Ruckle contended he was entitled to.
>
> "We agree with the conclusion reached by the court below."

These are the highlights of the saga up to the time of the re-arraignment before me of March 23, 1962. Other proceedings in the Federal courts and in the Baltimore City Court are not here discussed because they had no direct bearing upon my decision and (since relief was denied in such proceedings) upon the position of Ruckle at the time of re-arraignment. I note in passing, however, that he never requested a new trial.

It is also to be noted that, following an appearance in Criminal Court on May 11, 1960, Albert H. Blum, Esquire, was appointed to represent Ruckle. Following Mr. Blum's appointment as Judge of the Municipal Court of Baltimore City, Judge James K. Cullen, by order dated May 2, 1961,

allowed him to strike his appearance. Thereafter, Roland Walker, Esquire, was appointed as Ruckle's counsel.

At the re-arraignment before me on March 23, 1962, Ruckle and Mr. Walker were present in open court. The Assistant State's Attorney related the events to me substantially as outlined above; and Ruckle was questioned by the Court, Mr. Walker, and the Assistant State's Attorney. Under oath, he testified that it had *never* been his intention or desire to secure a new trial. Not only do I find this to be corroborated by the proceedings which I have above outlined, but also I find absolutely nothing to suggest any other conclusion.

It is clear to me that Ruckle wants the best of two worlds: He wishes to preserve his objections to the trial of May, 1957; but he does not desire to have such objections operate as a basis for granting a new trial. He noted before me and in his application for leave to appeal that he feared the penalty which might be imposed for kidnapping at a second trial. *Code* (1957), Article 27, Section 337. Cf. *Willis v. Warden*, 220 Md. 692, 694, footnote 1.

Of course, it has never been my function to make any determination of guilt or innocence. However, although I have not and do not draw any such conclusions, it is particularly worthy of note in regard to his attitude toward a new trial that he has never, in the multitude of pleadings which he has filed and in his several appearances before members of the Supreme Bench, made any allegation that he was innocent. It might well be that he felt such contentions were irrelevant in collateral or pre-trial appearances; but, on the other hand, it might reflect a feeling on his part, justified or unjustified, that the chances of success in a new trial are not such as he desires to risk. Cf. *Willis v. Warden*, 220 Md. 692, 694, footnote 1.

To me, there are several independent legal principles applicable to this situation, all of which lead to a single conclusion. First of all, I do not read Judge Tucker's learned opinion as imposing a new trial upon Ruckle if the latter does not desire such. At several places in that

opinion, it is noted that the procedural error upon which relief was granted is one which may be waived. Judge Tucker found that Ruckle did not know of that error at the time he withdrew his direct appeal and was, therefore, entitled to collateral relief. Had Ruckle then been more articulate in his position that, even if he had known of the error, he still did not wish it to operate as a basis for a new trial, it is inconceivable to me that Judge Tucker would, especially when the sentence upon conviction in a new trial could be death, have done what would be tantamount to imposing questionable "relief" upon a person who did not desire such.

While I feel that what has already been said finally disposes of the matter, I am reinforced by another legal principle which arises under the peculiar facts of this case. Ordinarily, when a convicted person seeks relief from the judgment, he may not plead double, or former, jeopardy. Compare, *1 Wharton, Criminal Law & Procedure* (Anderson Ed.), Sec. 139, Pg. 313, Sec. 142; *5 Wharton*, op. cit., Sec. 2162. However, in 22 C.J.S. "Criminal Law," Sec. 271, at pg. 697, the following qualification is noted:

> However, it is only where accused has brought about the destruction of the first verdict that he can be tried again for the same offense; and he will be protected from a subsequent prosecution for the same offense where a valid verdict, rendered by a jury regularly obtained and impanelled, upon a sufficient indictment, is set aside by the court on its own motion or on application of the prosecuting attorney, unless accused acquiesces therein. So, an arraignment, plea of guilty and assessment of penalty, although set aside by an erroneous judgment of dismissal, constitutes double jeopardy and may be so pleaded.

In *People v. McGrath*, 96 N.E. 92 (N.Y.), an attorney requested that a verdict be set aside. His client objected, but the trial court refused to entertain the objection and granted a new trial. The New York Court of Appeals held, at 96 N.E. 95:

> In a criminal case, it is only where the accused has brought about the destruction of the first verdict that he can again be put upon trial for the same offense. This defendant seasonably abandoned his attempt to destroy the verdict which has pronounced him guilty of murder in the second degree. A new trial could not lawfully be forced upon him after such abandonment.

This holding was followed in the more recent case of *People v. Craven*, 65 N.Y.S. 2d 748, aff'd 70 N.Y.S. 2d 513. See also, *State v. Pitts*, 57 Mo. 85; *State v. Brannon*, 55 Mo. 63; *Grisham v. The State*, 19 Tex. Cr. A. App. 504, 515.

In Maryland, the cases deal with the subject of the involvement of double jeopardy in re-trials, not upon the basis of waiver, but in terms of whether or not the first trial constitute a "mistrial." However, these cases involve situations either where the defendant himself has appealed from the verdict (e.g. *State ex rel. Shatzer v. Warden*, 192 Md. 728, 729; *Basta v. State*, 133 Md. 568, 572; *Kenny v. State*, 121 Md. 120, 125; *Kearney v. State*, 48 Md. 16, 27; *Ford v. State*, 12 Md. 514, 549; *Cochrane v. State*, 6 Md. 400, 406-407; *The State v. Sutton*, 4 Gill 494; cf. *State v. Williams*, 5 Md. 82, 84) or the first trial has been void rather than merely voidable (*Crawford v. State*, 174 Md. 175, 180; cf. *State ex rel. Shatzer v. Warden*, supra.)

That a defendant may be retired only on his own motion after a voidable first trial is implicit in the case of *State v. Reed*, 12 Md. 263. There the defendant, at the close of the case, asked and was granted a directed verdict based upon the insufficiency of the indictment. The State sought to try him under a new indictment, to which he pleaded former jeopardy. The Court of Appeals held that defendant's failure to object to the sufficiency of the indictment by way of demurrer was a waiver of any defects therein; that he would have thereafter been bound by any verdict returned by the jury; and that he could not be tried again for the same crime. At pg. 273, it was said that—

> The law pointed out the mode in which he was to take advantage of the defects in the indictment; if

> he failed to avail himself of it, the verdict of the jury was conclusive against him, and, if so, there would be no mistrial; and if no mistrial, then he is not liable to be tried again for the same crime.

cf. *Cochrane v. State*, supra, at 406, 407. See also, *Friend v. State*, 175 Md. 352, 355-356. If a defendant deliberately elects, for whatever reasons are sufficient to him, to bind himself by a voidable proceeding, neither the State's Attorney, the Grand Jury, nor the courts can deprive him of his right to do so.

I am not unmindful of the well-recognized rule that where a defendant notes an *appeal*, he is deemed to have waived any objections of double jeopardy with regard to the relief awarded him. *Forman v. United States*, 361 U.S. 416, 425-426; *Commonwealth v. Murphy*, 54 N.E. 860 (Mass.), aff'd 177 U.S. 155. See also, *Sterling v. State*, 9 S.W. 45 (Tex.). These cases turn, for the most part, upon the scope of relief which an appellate court has authority to grant. Cf. *Maryland Rules 870-875*. The effect of these holdings is nothing more than that a defendant, by noting an appeal, impliedly consents to any form of relief which the appellate court might choose to grant. As I see it, the position of the defendant here is somewhat different, in that under the Uniform Post Conviction Procedure Act, he is somewhat more the master of his own ship so far as relief is concerned. Cf. *9B Uniform Laws Annotated*, 356-357.

Article 27, Section 645D, which is part of the Uniform Post Conviction Procedure Act, states that—

> The petition shall identify the proceedings in which the petitioner was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the petition is based, and *clearly state the relief desired*. (Emphasis supplied.)

It seems to me that this provision gives the petitioner in a post conviction proceeding somewhat more control, at least in a negative sense, over the final disposition in that

case than is had by an appellant on a direct appeal. The instant situation perhaps reflects the wisdom of that manner of operation. Of course, Section 645G of the same Act provides, in part, that:

> If the Court finds in favor of the petitioner, it shall enter an *appropriate order* with respect to the judgment or sentence in the former proceedings. . . . (Emphasis supplied.)

However, an order which grants relief which the petitioner, who has instituted the proceeding, expressly does not want, would be (and is) a futile gesture.

In this case, Judge Tucker, finding that Ruckle could not have "the relief desired" (Section 645B), very commendably granted the only relief which was available — a new trial. As seen, Ruckle had not then done any act which could be construed as waiving objection to double jeopardy on a new trial — albeit he had asserted (inarticulately) that he did not want a new trial. In 99% of the cases, the relief afforded *sua sponte* by Judge Tucker would have been accepted with thanks by a grateful convict. But, I found as a fact that Ruckle has never acquiesced in this relief; and accordingly, it would be error for the Court then or now to impose upon him "relief" which he does not, and did not, desire.

It must be said that it is clear to me, as it must be to anyone who examines this record, that if Ruckle had not arbitrarily discharged his able counsel in the post conviction proceeding, the present confusion would not have resulted. His very elaborate pleadings, to which I have referred as supporting his contentions before me on March 23, 1962, certainly do not carefully refine his rather abstruse legal contentions; but they do, with his present explanation (aduced not without some difficulty) support his testimony.

To some degree, the defendant's machinations might be said to involve calculated confusion. On the other hand, his position, as expressed before me in open court on

March 23, 1962, which is supported by the record, is that he feels that the errors at his trial of May, 1957, require his outright release. He seeks to preserve those errors for that purpose alone. Whether such matters may operate in that sense is not before me; but insofar as a new trial is concerned, I find as facts (a) that they were never asserted for the purpose of securing a new trial, and *a fortiori*, were (whether before or after May 13, 1959) waived with respect to such relief. (leaving open the question of whether there has been a waiver of such objection as operating upon the question of outright release) and (b) that since the decision of May 13, 1959, granting the new trial, Ruckle has never acquiesced in or accepted the relief there granted.

I do not, first of all, find that Judge Tucker's disposition of the case was meant to be more than an offer of such relief to Ruckle. The concluding sentence of the opinion is that "It is the opinion of the court that the petitioner is *entitled* to the same relief as granted by the Court of Appeals to Midgett." (Emphasis supplied.) This imports to me that the relief was desired and/or would be accepted. Probably because of this supposition, the terms of the actual "order" are somewhat more peremptory in form; but in the context of the opinion as a whole, I cannot, and do not, read Judge Tucker's decision as more than an *offer* of relief by way of new trial to the petitioner, similar to that made in *Willis v. Warden*, 220 Md. 692.

Even if the opinion were to be read in a more restrictive sense, I do not perceive that the final result would be different. From the facts related to me, it is clear that such disposition would have been made either as the result of an incomplete understanding of Ruckle's singleness of purpose or upon an *assumption* that Ruckle would accept the relief granted. In either event, the court's action would have been a "mistake" within the meaning of Maryland Rules 625 and 764(b). Judges Tucker and Warnken having both retired from the Bench, I would still have authority to make such modification as would correct the mistake and re-instate the sentence (if such be then necessary) of

May 9, 1957. Maryland Rule 749. Cf. *Code* (1957), Article 27, Section 642.

Needless to say, I find nothing in the decision of the Court of Appeals in denying application for leave to appeal in the post conviction case which is contrary to what has been said above. That decision rested solely upon the propriety of the relief there granted as opposed to outright release. The opinion does not in express terms state that Ruckle *must* have a new trial; nor do I find any implication that such course must be followed in the face of express waiver or rejection by the petitioner. Again, it is very clear that Ruckle did not make the exact nature of his contention clear to the Court of Appeals.

I, therefore, directed that the verdicts of May 9, 1957, be re-entered and that the defendant continue to serve those sentences as then imposed, i.e., a total of 35 years from January 27, 1957.

5.

Ruckle v. State

Court of Appeals of Maryland

Decided February 7, 1963

230 Md. 580, 187 A. 2d 836

Cert. den. June 10, 1963. 374 U.S. 816, 10 L. Ed. 2d 1040, 83 S. Ct. 1711.

HENDERSON, J.

The appellant was indicted in 1957, jointly with one Davis and one Midgett, on a charge of kidnapping. He was also separately indicted for armed robbery. The three defendants were all tried together. They were all convicted and Ruckle was sentenced to 15 years for kidnapping and 20 years for robbery, to run consecutively. He appealed, but later dismissed his appeal. Midgett appealed and secured a reversal on the ground that the trial court had improperly answered a question propounded by the jury out of the presence of the accused. *Midgett v. State*,

216 Md. 26. On March 9, 1959, Judge Allen granted a motion to dismiss the kidnapping indictment against Midgett. Both he and Ruckle were subsequently re-indicted, although it does not appear the old indictment or judgment against Ruckle was set aside at that time. After a retrial, Midgett was unsuccessful in a second appeal. *Midgett v. State*, 223 Md. 282, *cert. den.* 365 U.S. 853.

Meanwhile, Ruckle filed a petition for post conviction relief in which he was granted a new trial, on May 13 1959, although he strenuously contended that he was entitled to a release and did not want a new trial. Leave to appeal was denied by this Court. *Ruckle v. Warden*, 220 Md. 683. On March 23, 1962, Ruckle was re-arraigned on the 1959 charge of kidnapping and the 1957 charge of robbery. He was specifically asked if he wanted a new trial, and replied emphatically that he did not and would never agree to one. The verdicts in the 1957 cases were then re-entered and he was sentenced to the same terms of imprisonment as were originally imposed. He appeals here.

The first contention is that because Ruckle filed a motion to quash the kidnapping indictment of 1959, he was entitled to a ruling thereon. If he had been willing to accept a new trial, it may well be that he would have been entitled to insist that the trial court rule upon the validity of the new indictment. But since he declined to stand trial again on that or any other indictment, and the trial court simply re-entered the verdicts upon the 1957 indictments, he cannot be heard to complain of the insufficiency of the 1959 re-indictment for kidnapping. That indictment is not before us on the present appeal, and we are not concerned with its sufficiency.

The appellant contends that if he had been tried anew he would have been placed in double jeopardy and deprived of a constitutional right. We have repeatedly held that the rule of double jeopardy is not a constitutional right. See *Robb v. State*, 190 Md. 641 and *Moquin v. State*, 216 Md. 524. We have also held that ordinarily where a former trial is set aside because the trial court has com-

mitted error, a new trial may be granted, without infringing upon the common law rule. *Willis v. Warden*, 220 Md. 692, 694 and cases cited. It was also pointed out in the *Willis* case that where a new trial is declined, a petitioner is not entitled to release. See also *State v. D'Onofrio*, 221 Md. 20, 26. That was also the holding affirmed by this Court in *Ruckle v. Warden*, *supra*, 220 Md. 683.

Whatever the reasons for his refusal to accept a new trial (we might infer from some of his testimony that he feared a heavier sentence or at least no more favorable result), we think the action taken by the court below can be supported on the theory of abandonment or waiver. Possibly the court could have insisted that the State go on with its case despite the protests of the defendant, who would hardly be the first objector to criminal process. But there is authority for the proposition that after a seasonable abandonment, or attempt to abandon, a motion for a new trial, a new trial may not be forced upon a defendant, *People v. McGrath*, 96 N.E. 92 (N.Y.). We think the appellant's refusal to accept the only remedy then available was, in effect, a withdrawal of his original application for post conviction relief. The holding that he was not entitled to release had become the law of the case. His only available choice was between a new trial or a return to the status quo. Refusal to accept the former was tantamount to a selection of the latter. It was implicit in the order striking out the judgments and sentences and granting a new trial on each charge that it was conditional upon the acceptance of a new trial. The action of the trial judge in reinstating the judgments and sentences was merely a recognition of the conditional nature of the order.

Other points sought to be raised by the appellant of his own motion are mere variations upon the points argued by his court-appointed counsel. We see no occasion to discuss them further.

JUDGMENTS AFFIRMED.

6.

Ruckle v. Warden

United States District Court for the District of Maryland

Filed July 23, 1963

Unreported.

WINTER, Judge:

Petitioner seeks the issuance of a writ of habeas corpus on facts which, if not unique, are seldom encountered. Appellant was convicted on charges of kidnapping and armed robbery, and sentenced to terms of fifteen (15) and twenty (20) years, respectively. He appealed, but later dismissed his appeal. After a codefendant had appealed and secured a reversal, petitioner instituted proceedings for post conviction relief. He was granted a new trial, but he strenuously contended that he was entitled to release and did not want a new trial. When he was rearraigned preparatory to a new trial, he was asked if he wished a new trial and he stated emphatically that he did not, and would never, agree to a new trial. The verdicts in the previous cases were then reentered and his original sentence was reimposed.

The historical facts, as stated above, were found by the Court of Appeals in *Ruckle v. State*, 230 Md. 580 (1963), an appeal taken by petitioner from the reimposition of the original sentences after he had refused to accept the new trial granted him as a result of his post conviction proceedings. Two petitions for writs of habeas corpus to this Court, both made prior to the post conviction proceedings in the Maryland Court, were dismissed as premature because petitioner had not exhausted his state remedies. An appeal to the United States Court of Appeals for the Fourth Circuit was dismissed, certiorari denied by the Supreme Court of the United States, 371 U.S. 845 (1962).

The thrust of petitioner's complaints here is that his original conviction was invalid for a variety of reasons, that reimposition of the original sentences after he refused

to accept a new trial placed him in double jeopardy, and that he is entitled to immediate release. Petitioner makes abundantly clear that he is not interested in a new trial on the original indictments but, rather, contends that he is entitled to immediate release.

In rejecting relief in the appeal which petitioner took to the Maryland Court of Appeals, the Court of Appeals stated:

> "Whatever the reasons for his refusal to accept a new trial (we might infer from some of his testimony that he feared a heavier sentence or at least no more favorable result), we think the action taken by the court below can be supported on the theory of abandonment or waiver. Possibly the court could have insisted that the State go on with its case despite the protests of the defendant, who would hardly be the first objector to criminal process. But there is authority for the proposition that after a seasonable abandonment, or attempt to abandon, a motion for a new trial, a new trial may not be forced upon a defendant, People v McGrath, 202 N.Y. 445, 96 N.E. 92. We think the appellant's refusal to accept the only remedy then available was, in effect, a withdrawal of his original application for post conviction relief. The holding that he was not entitled to release had become the law of the case. His only available choice was between a new trial or a return to the status quo. Refusal to accept the former was tantamount to a selection of the latter. It was implicit in the order striking out the judgments and sentences and granting a new trial on each charge that it was conditional upon the acceptance of a new trial. The action of the trial judge in reinstating the judgments and sentences was merely a recognition of the conditional nature of the order."

This Court agrees with the Maryland Court of Appeals and holds that petitioner's contentions with reference to the validity of the original trial, and his contention that reimposition of the original sentence constituted double

jeopardy are not questions presented for determination here, because they have been waived in the state courts. *Fay v. Noia*, 372 U.S. 391 (1963), while severely limiting application of the doctrine of waiver, nevertheless, recognizes that waiver may still occur. In that case, the Court said:

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits — though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. * * * At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. * * * A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question. * * *."

There can be little question but that petitioner was fully aware of the relief to which he was entitled. After he was granted a new trial as a result of his application for post conviction relief he sought leave to appeal to the Court of Appeals of Maryland on the ground that he was entitled to release and not to a new trial. *Ruckle v. Warden*, 220 Md. 683 (1959). Following that unsuccessful application, petitioner was rearraigned and, at his rearraignment, he was asked if he wanted a new trial. In that court he refused a new trial and he vigorously reasserts in his petition here that he does not wish a new trial. Even without a hearing the record is abundantly clear that petitioner knew the relief to which he was entitled and, with such

knowledge, has refused that relief. Under the circumstances, there is no ground for federal habeas corpus relief.

It is, therefore, this twenty-third day of July, 1963, by the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND,

ORDERED, that petitioner's petition for a writ of habeas corpus be, and it is hereby, denied; leave to file in forma pauperis is hereby granted; and the Clerk is directed to mail a copy of this Memorandum and Order to petitioner.

7.

Ruckle v. Warden

United States Court of Appeals for the Fourth Circuit

Decided June 18, 1964

..... F. 2d .....

SOBELOFF, Chief Judge:

Petitioner Ruckle was convicted in the Criminal Court of Baltimore City of kidnapping and armed robbery, and sentenced to 35 years' imprisonment. He later petitioned for relief under Maryland's Post-Conviction Procedure Act, claiming that he had been denied his constitutional right to be present at all stages of the trial. The trial judge, out of the presence of the petitioner, had answered inquiries addressed to him by the jury in the course of its deliberations. Another judge of the Supreme Bench of Baltimore City, sitting in the post-conviction proceeding, set aside the judgment as a nullity and ordered a new trial.

In his petition for post-conviction relief, Ruckle stated that he did not desire a new trial, and when later rearraigned before still another judge he categorically refused to accept a new trial, claiming that he was entitled to unconditional release.* The presiding judge then in-

* "Q. (Mr. Sause) [The Assistant State's Attorney] There is one question I would like to pose. Would you state, if you care to, your reason for not wanting a new trial? A. I feel there has been an

formed him that the only alternative to a new trial was reimposition of the original sentence. Ruckle declined both alternatives, insisting, as stated, on unconditional release. The judge thereupon reimposed the sentence. On appeal the Maryland Court of Appeals affirmed, reasoning that by refusing to accept a new trial, which was the only remedy available to him after the conviction was set aside, the petitioner in effect withdrew his application for post-conviction relief. *Ruckle v. State*, 230 Md. 580, 583, 187 A. 2d 836 (1963).

Ruckle then sought a writ of habeas corpus in the District Court for the District of Maryland. That court held that Ruckle had waived his right to federal habeas corpus relief by refusing to accept the state's offer of a new trial. The petition for habeas corpus was denied, but with leave to prosecute this appeal in forma pauperis.

In this court, William L. Marbury and his associate, Lewis A Noonberg, were appointed to present the appeal. They argue with earnestness that the judge who presided at the rearraignment should not have insisted on the defendant *accepting* a new trial as the only alternative to the reimposition of the original sentence. They contend that the defendant's acceptance of a new trial with implications of possible waiver of rights was not the true alternative to a reimposition of the sentence, for a defendant is not ob-

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error made and my sentence and judgment has been ruled by the Court of Appeals as null and void and it is illegal and I felt that if it was illegal I could get out free without having to stand a second trial, and that is one of my reasons for not wanting a new trial.

* * * * * *

"Q. And at this time you are telling His Honor you do not want a new trial? A. I don't want a new trial and never have wanted one in this case.

"(Mr. Sause) We request the original judgment and sentence in indictments 446 and 1023 be reimposed.

"(The Witness) I object.

"(The Court) If you do not want a new trial, I have no alternative except to reimpose the sentences.

"(The Witness) If the Court is informed the sentence and judgment is void and ruled so by the Court of Appeals I would be placed back in the penitentiary on an illegal sentence."

liged to accept a new trial, nor is the right of the state to retry him dependent in any way on the defendant's acceptance. When this defendant refused to accept a new trial at his second arraignment, the proper course, it is contended, was for the judge to order the clerk to enter a plea of not guilty and to proceed with the trial which had been ordered at the conclusion of the post-conviction hearing.

We agree with the state's contention that when the defendant's original trial was declared a nullity, he did not automatically become entitled to release; he was still subject to retrial. But we agree also with the argument of Ruckle's counsel that his refusal to *accept* the new trial did not subject him to being resentenced upon a conviction which had theretofore been annulled. Ruckle's misapprehension concerning the consequences of his refusal to acquiesce in a new trial does not affect the legal principle involved. The effect of the refusal of a defendant to plead when arraigned is too well known to require discussion. A not guilty plea is entered for him and the case proceeds. The state does not need the defendant's consent to put him on trial, but it needs a lawful trial to convict, and a lawful conviction to sentence. The deviation from regularity which brought condemnation from the Court of Appeals of Maryland upon the original trial* — namely, the trial judge's answering questions addressed to him by the jury out of the defendant's presence — was slight indeed compared to the egregious procedure of passing sentence in the absence of a constitutional trial. No one may be sentenced without a valid conviction. This principle tolerates no short-cuts.

Abstract rhetoric about void and voidable convictions is not persuasive. When the Court of Appeals of Maryland annulled the conviction, the sine qua non for the sentence was obliterated, and this nullity cannot be resuscitated and made to serve as the basis for a sentence. States have wide latitude in fashioning procedures in their own courts, but no court may, consistent with the demands of due process,

* The judge who presided in the first trial did not preside in the second.

send a man to prison for a long term of years without first lawfully convicting him. This is more than minor technical detail; it goes to the heart of the court's jurisdiction.

It is, of course, true that a defendant may abandon his right to a new trial, and if such abandonment is made with clear understanding and voluntarily, he should be bound by it. Here the defendant did not unqualifiedly waive his right to a new trial. His refusal to *accept* a new trial was based on his expressed belief that he was entitled to unconditional release. Forfeiture of life or liberty should not be held to have occurred when the circumstances leave room for doubt as to whether the alleged waiver was fully understood, intended, and free from coercion. *Fay v. Noia*, 372 U.S. 391 (1963).

Mr. Marbury and Mr. Noonberg inform us that they have fully explained his rights to the defendant, and* he adheres to his refusal to consent to a retrial and intends to plead former jeopardy if put on trial. We hold merely that he is not foreclosed from making any plea he wishes. We are not called upon in this proceeding to consider the merits of such a plea. If made, it can be dealt with at his new trial in regular course.*

In the somewhat unusual circumstances of this case, we are of the opinion that it should be remanded to the District Court with directions to hold the same on the docket for a reasonable period, to afford the state the opportunity to retry Ruckle on the indictment.

The order dismissing the writ of habeas corpus is vacated and the case remanded for further proceedings in accordance with the foregoing views.

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* Petitioner's Note. The language between the asterisks in the text was substituted on June 23, 1964, for the following:

". . . that he is now prepared to submit to a new trial. The State's Attorney has suggested that this election may no longer

HAYNSWORTH, Circuit Judge, dissenting:

I do not see any constitutional infirmity here.

Ruckle challenged his original conviction. In that proceeding under Maryland's Post-Conviction Procedure Act, he had no other hope of reward than a new trial. Ruckle, however, misunderstood the situation and mistakenly thought that a favorable outcome of the proceeding would produce his release. He, therefore, refused to plead when he was rearraigned, stating in most unequivocal language that he never had wanted a new trial, never had sought one, and stoutly objected to it. Indeed, he had clearly stated in his post conviction proceeding that he wanted no new trial.

Ruckle had been sentenced to thirty-five years imprisonment on charges of kidnapping and armed robbery. He could have gotten a good deal more. He may well have thought, with justification, that he did not want to risk a new trial and the possibility of a larger sentence. When

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be open to the defendant, and that his refusal at the rearraignment may constitute a bar to his right to a new trial."

This followed an exchange of correspondence between Ruckle's counsel and the Court:

"June 19, 1964

"Honorable Simon E. Sobeloff
Room 321, Post Office Building
Asheville, North Carolina

"Re: No. 9169
Morris Ruckle, Appellant,
v. Warden, Maryland Penitentiary, Appellee

"Dear Judge Sobeloff:

"I have just received from Mr. Dean a copy of the opinion of the Court in No. 9169, Morris Ruckle, appellant, v. Warden, Maryland Penitentiary, appellee. Mr. Noonberg and I are both naturally very much gratified by the result, but we are disturbed by a statement which appears in the next to the last paragraph of the opinion to the effect that:

"'Mr. Marbury and Mr. Noonberg inform us that they have fully explained his rights to the defendant, and that he is now prepared to submit to a new trial'

"It may be that there has been a misunderstanding which we should correct immediately. The fact is that we informed Mr. Ruckle that if he were successful in this appeal, he would in our opinion

he was told he was not entitled to release, I think he should have had the option to have the original sentence reimposed or to stand trial. The court gave him the choice. When he refused to exercise the option, however, I see no fault of constitutional dimension in having the court exercise it for him either way.

Ruckle's original conviction was not void. Because of trial error it was voidable, but Ruckle, himself, could have claimed the protection of the earlier judgment and prevented any possible retrial by abandoning his collateral attack upon it at any time before the collateral proceeding was finally determined. After the event, when it developed that he would not have prosecuted the proceeding in the first place if he had realized its consequence, I see no constitutional wrong done him when the court relieves him of it.

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have to stand a retrial. We stated to him that at such a retrial he would be free to raise the defense of double jeopardy for whatever that might be worth and that he could not be required to consent to a new trial. We told him that if he preferred to accept the existing sentence rather than to run the risk of a possible heavier sentence which must result in a new trial, then he would be well-advised to abandon his appeal.

"Mr. Ruckle instructed us to go ahead with the appeal, provided that he would still be free to object to a retrial and to raise the defense of double jeopardy. In that sense I suppose that it could fairly be said that he is 'prepared to submit to a new trial,' but I think the record should be clear that he has not sought a new trial and still maintains that to retry him would be a denial of his constitutional rights.

"If Mr. Noonberg and I have given the Court a different impression from that set out above, then we have expressed ourselves very ineptly.

Yours very truly,

WILLIAM L. MARBURY"

"June 23, 1964

"Gentlemen:

"At the direction of Chief Judge Sobeloff, I am enclosing photo copy of corrected opinion in the above-entitled case.

"These corrections were made at the request of Mr. Marbury and Mr. Noonberg.

Very truly yours,

/s/ MAURICE S. DEAN, Clerk"

It stands reiteration that Ruckle in the post conviction proceeding clearly stated that he did not want a new trial. He had not asked for the relief granted him in the post conviction proceeding, and he undertook to overturn the order vacating the original conviction. Leave to appeal, however, was denied.[1] Ruckle was then brought in for rearraignment, where he renewed his protestations against a new trial.

The Maryland Court of Appeals took this to be an abandonment of his post conviction attack upon the original judgment.[2] Coupled with is insistence in the post conviction proceeding that he did not want a new trial, that construction of what Ruckle did seems abundantly justified, The Court of Appeals of Maryland said:

> "* * * But there is authority for the proposition that after a seasonable abandonment, or attempt to abandon, a motion for a new trial, a new trial may not be forced upon a defendant, People v. McGrath, 202 N.Y. 445, 96 N.E. 92. We think the appellant's refusal to accept the only remedy then available was, in effect, a withdrawal of his original application for post conviction relief. The holding that he was not entitled to release had become the law of the case. His only available choice was between a new trial or a return to the status quo. Refusal to accept the former was tantamount to a selection of the latter. It was implicit in the order striking out the judgments and sentences and granting a new trial on each charge that it was conditional upon the acceptance of a new trial. The action of the trial judge in reinstating the judgments and sentences was merely a recognition of the conditional nature of the order."

Thus as a matter of state law, as declared by the Court of Appeals of Maryland, the Supreme Bench of Baltimore City, which had imposed the original judgment of conviction and which later had conditionally vacated that

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[1] Ruckle v. Warden, 220 Md. 683, 155 A. 2d 69.
[2] Ruckle v. Maryland, 230 Md. 580, 187 A. 2d 836.

judgment, had the power to reinstate the original judgment of conviction and the verdicts upon which it was based. That is what it did, and the original judgment of conviction as thus reinstated, of course, supports the new sentence. Thus, while Maryland might have found as a matter of state law that there was no conviction to support the new sentence, we have no right to say so, and if the original judgment was validly reinstated as a matter of state law, there is no basis for a contention that the state law thus applied is in conflict with the Fourteenth Amendment to the Federal Constitution.

Thus reinstatement of the original judgment of conviction and reimposition of the original sentence was an alternative open at the time of rearraignment under state law, and state law thus applied is not constitutionally invalid.

Even now Ruckle's willingness to submit to a new trial as the only alternative to service of the sentences previously imposed upon him as far from unequivocal. His distinguished court-appointed counsel have explained to him that if he prevails in this action, he need not consent to a retrial, and the majority holds that he need not, and that, upon a retrial, he can plead double jeopardy for whatever that plea may be worth. Ruckle instructed them to proceed with the appeal after having been told by his attorneys that the appeal should be abandoned if he preferred to avoid the risk of a heavier sentence which would be incurred by him in the event of a conviction following a new trial. His instructions to proceed, however, were conditioned upon his continued freedom to object to a new trial and his right to plead double jeopardy. It thus appears that now, as from the outset, Ruckle is misguided by a misplaced faith in the magic of a plea of double jeopardy, which appears from this point of view to be wholly futile and hopeless. He appears to be saying still, as he said at the time he was called for rearraignment, "I don't want a new trial and never have wanted one * * *."

However, the present situation is largely irrelevant. We should look to the situation as presented to the court at the

time Ruckle was brought before it for rearraignment, when, from all that then appeared, a new trial was the last thing Ruckle wanted.

Does the Constitution of the United States require a state court to force a prisoner to accept a retrial at the risk of a sentence greater than that imposed upon him after the first trial? I think not.

JUDGMENT

Filed and Entered June 18, 1964.

United States Court of Appeals for the Fourth Circuit

No. 9169

Morris Ruckle,

Appellant,

v.

Warden, Maryland Penitentiary,

Appellee.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be and the same is hereby vacated; that this cause be, and the same is hereby remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein; and that the costs on appeal be borne by the appellee.

/s SIMON E. SOBELOFF,

Chief Judge, Fourth Circuit.

June 18, 1964.

APPENDIX B

1.

State of Maryland ex rel. Morris Ruckle

v.

Warden, Maryland Penitentiary

Baltimore City Court

Decided June 10, 1958

Unreported

The petitioner, Morris Ruckle, addressed an application for a writ of habeas corpus to the Honorable Emory H. Niles, Chief Judge of the Supreme Bench of Baltimore City; and in accordance with a resolution of the Supreme Bench relating to such cases, the matter was referred to the undersigned judge for action.

The petitioner was jointly indicted with one Midgett and one Davis on a charge of kidnapping, and each of the men was separately indicted on a charge of robbery, but all the cases were tried at one time. All of the defendants were convicted on both charges, but Davis received a sentence totaling a term of 15 years, and each of the other defendants were sentenced for a total term of 35 years, in prison. Davis did not enter an appeal, but Midgett entered an appeal and the Court of Appeals reversed the judgment of the lower court in each of the cases as to Midgett and ordered a new trial. A ground of the decision of the Court of Appeals was that after the jury had retired to consider their verdict they sent messages to the trial judge asking in substance whether the defendants would be sentenced to "death" if their verdict was guilty in the kidnapping case. These messages were in writing, and the court's written reply was in substance that the sentence would not be "deatn". The defendants were not present at the time of the exchange of messages and did not know of them at the time. The Court of Appeals decided that since the appellant, Midgett, had an absolute right to be present at every stage of the trial, the judgment that was rendered, under the circumstances, was invalid.

The petitioner, Ruckle, entered an appeal from the judgment against him but he later voluntarily withdrew it; and, of course, the question upon the basis of which he seeks a writ of habeas corpus is such as would properly be determined on appeal.

The defendant, Midgett, has obtained a right to a new trial; but it cannot be determined at this time whether he will eventually be better off or worse off thereby. Therefore, it cannot yet be said that if the petitioner had continued with his appeal instead of dismissing it he would probably be sentenced to a shorter term of imprisonment. If eventually there should appear to be any substantial injustice to the petitioner because of the outcome of the new trial for Midgett, he might petition the proper authorities for relief by way of executive clemency and have the matter considered in the light of existing circumstances. However, since, as aforesaid, the question which forms the basis of the petition herein is one that could have been decided by the Court of Appeals, and the petitioner voluntarily withdrew his appeal to that court, he is legally in the custody of the respondent, and he cannot obtain release from such custody by way of habeas corpus proceeding.

For the reasons stated the issuance of a writ of habeas corpus is denied.

/s/ JOHN T. TUCKER,
Judge.

2.

Morris Ruckle v. Warden of the Maryland Penitentiary

United States District Court for the District of Maryland

Decided August 28, 1958

Unreported

The application for writ of habeas corpus filed by petitioner must be denied because he has not exhausted his

state remedies, *Brown v. Allen*, 344 U.S. 443; *Darr v. Burford*, 330 U.S. 200:

(1) Petitioner has not applied for a writ of certiorari to the Supreme Court of the United States either from his conviction or from the denial of his application for writ of habeas corpus in the state court.

(2) Petitioner has not exhausted his remedy under the Post Conviction Procedure Act, Article 27, Sections 645A to 645J, Annotated Code of Maryland, 1957 ed., as enacted by Chapter 44 of the Acts of 1958. If the point raised by petitioner was waived in the proceedings resulting in his conviction, he can have no proper claim here on the merits; if it was not waived in those proceedings, it has not been previously and finally litigated within the meaning of Section 645A(a).

Leave to file in forma pauperis granted; petition for writ of habeas corpus denied.

/s/ ROSZEL C. THOMSEN,
Chief Judge, U.S. District Court.

3.

State of Maryland, ex rel. Morris Ruckle

v.

Warden, Maryland Penitentiary

Baltimore City Court

Decided April 21, 1960

Unreported

The Petitioner Morris Ruckle has made application for writ of habeas corpus in the Baltimore City Court and the matter was referred to the undersigned judge for action thereon.

The only contention made by the Petitioner in his application is that he is unlawfully detained because the "petitioner has no conviction of crime or sentence imposed upon him by any court of the State of Maryland."

The record shows that the Petitioner Ruckle was granted a new trial in a post conviction proceeding before Tucker, J. An appeal was taken by the Petitioner to the Court of Appeals of Maryland, and the decision of Tucker, J., granting a new trial to the Petitioner was affirmed therein. Subsequently an Order was signed transferring the Petitioner Ruckle to the Awaiting Trial Division of the Baltimore City Jail, in accordance with the mandate of the Court of Appeals of Maryland.

Upon application by the Petitioner, an Order of the Court of Appeals allowing a Stay of Judgment of the mandate for a period of ninety days was granted, to enable the Petitioner to apply to the Supreme Court of the United States for a writ of certiorari; and if application to the Supreme Court for writ of certiorari was made within the ninety day period, then the Stay of Judgment of the mandate was to be in effect until the matter was disposed of by the Supreme Court of the United States. Accordingly the Petitioner was transferred back to the Maryland Penitentiary to await the outcome of his application for a writ of certiorari to the Supreme Court of the United States.

By inquiry to the Supreme Court of the United States, this Court has ascertained that no petition has been filed therein by the Petitioner; therefore, since the ninety day period has expired, the Stay of Judgment Order of the Court of Appeals of Maryland is no longer in effect and the Petitioner is now in the position of awaiting trial of the indictments filed against him.

An Order has been signed by Cullen, J. in the Criminal Court of Baltimore City, transferring the Petitioner from the Maryland Penitentiary to the Awaiting Trial Division of the Baltimore City Jail. His new trial is in accordance with the mandate of the Court of Appeals of Maryland, and he is, therefore, legally in custody of the State of Maryland awaiting such new trial.

For the reasons stated the issuance of a writ of habeas corpus is denied.

/s/ E. PAUL MASON,
Judge.

4.

State of Maryland, ex rel. Morris Ruckle

v.

Warden, Baltimore City Jail

Baltimore City Court

Decided May 17, 1960

Unreported

Cert. den., Oct. 10, 1960. 364 U.S. 851, 5 L. Ed. 2d 74, 81 S. Ct. 97.

The Petitioner, in his application, contends that he is illegally held in custody waiting a new trial on indictments for the same crimes of which he has previously been convicted. The Petitioner, together with Charles E. Midgett, was convicted and sentenced for the robbery and kidnapping of a police officer. Both Midgett and the Petitioner appealed, but the Petitioner subsequently dismissed his appeal before it was heard by the Court of Appeals. On May 13, 1959, Judge Tucker, upon the Petitioner's application for post conviction relief, set aside the judgment and sentence of the Criminal Court of Baltimore as to him and granted him a new trial. The Petitioner contended that because he had dismissed his appeal for the invalid judgment and sentence, he was entitled to immediate and final release from custody; that granting him a new trial was not sufficient. Judge Tucker held that the Court had authority to enter an appropriate order with respect to the judgment or sentence and decided the Petitioner was entitled to a new trial but was not entitled to be released from custody. On appeal, the Court of Appeals affirmed Judge Tucker's decision, stating:

> "Judge Tucker noted that the court had authority to enter an appropriate order with respect to the judgment or sentence (Code (1958 Supp.), Art. 27, sec. 645G) and decided that Ruckle was entitled to a new trial, which was the same relief as Midgett had been

granted by this Court, but not the preferred status Ruckle contended he was entitled to.

"We agree with the conclusion reached by the court below." *Ruckle v. Warden*, 220 Md. 683.

Thereafter, the Petitioner made an application for the writ of *habeas corpus* again alleging that he was unlawfully detained because he had no conviction of crime or sentence imposed upon him by any court in the State of Maryland. In an order, dated April 21, 1960, Judge Mason denied the application for the writ.

For the reasons set forth by Judge Tucker and affirmed in the per curiam decision of the Court of Appeals and in Judge Mason's order, the application herein is denied.

/s/ REUBEN OPPENHEIMER,
Judge.

5.

Morris Ruckle

v.

Warden of the City Jail of Baltimore, Maryland

United States District Court for the District of Maryland

Decided November 1, 1961

Unreported

Morris Ruckle has filed an elaborate petition for writ of habeas corpus, contending that he is entitled to immediate release from custody.

Petitioner and two co-defendants, Midgett and Davis, were convicted of kidnapping and robbery in the Criminal Court of Baltimore City on May 3, 1957. Petitioner was sentenced to thirty-five years in the Maryland State Penitentiary.

Both Midgett and petitioner filed appeals. Before his appeal was heard, petitioner dismissed his appeal. Midgett,

however, continued with his appeal, and the Court of Appeals reversed the verdicts and sentences as to Midgett and granted him a new trial. *Midgett v. State*, 216 Md. 26. The ground for the reversal was that certain instructions had been given to the jury when neither the defendants nor their attorneys were present in the court room.

Petitioner thereafter filed a petition for relief under the Maryland Post Conviction Procedure Act, praying that he be released from custody by reason of the errors committed in the original trial of his case and contending that the granting of a new trial would not be a sufficient remedy. In May 1959 Judge Tucker, sitting in the Criminal Court of Baltimore City, passed an order setting aside the judgments and sentences as to petitioner and granting him a new trial under the authority given by Art. 27, sec. 645G, Anno. Code of Maryland, 1957 ed. Petitioner appealed from that order, contending that the Court should have released him from custody immediately. The Court of Appeals of Maryland affirmed Judge Tucker's ruling. *Ruckle v. Warden*, 220 Md. 683.

Applications for the writ of habeas corpus have been denied by at least two judges of the Supreme Bench of Baltimore City. An appeal from Judge Oppenheimer's order was denied by the Court of Appeals on June 8, 1960. Petitioner sought certiorari, which was denied by the Supreme Court of the United States on October 10, 1960. *Ruckle v. Warden*, 364 U.S. 851. In the meantime, this court, in 1958, had denied a petition for writ of habeas corpus on the ground that the petitioner had not exhausted his state remedies.

The present petition is verbose and confusing, but it appears to seek an immediate release on two grounds: (1) that, after petitioner had withdrawn his appeal from his original conviction, he was granted a new trial by Judge Tucker against his wishes, and that as a result of the granting of a new trial he was placed in double jeopardy in violation of his constitutional rights; and (2) that as a result of the error involved in his original trial in the Criminal Court of Baltimore City he is entitled to be released from custody.

With respect to the second point, petitioner has already been granted a new trial by the Criminal Court of Baltimore City, and this is undoubtedly the proper remedy for the error committed at his original trial. *Willis v. Warden*, 220 Md. 692; *State v. D'Onofrio*, 221 Md. 20.

With respect to the question of double jeopardy, the present petition is premature. Petitioner can raise the point when he is brought to trial in the Criminal Court of Baltimore City. See *State ex rel. Shatzer v. Warden*, 192 Md. 728. Until he has exhausted his state remedies and the state courts have had an opportunity to determine the question, it would be quite inappropriate for this court to express any opinion or grant any relief. 28 U.S.C.A. 2254; *Darr v. Burford*, 339 U.S. 200; *McCoy v. Tucker*, 4 Cir., 259 F. 2d 714.

ORDER

Leave to file in forma pauperis is hereby granted; but, for the reasons set out above, the petition for writ of habeas corpus is hereby denied.

The Clerk is instructed to send a copy of this memorandum opinion and order to the petitioner.

/s/ ROSZEL C. THOMSEN,
Chief Judge, U. S. District Court.

6.

Morris Ruckle

v.

Warden of the City Jail of Baltimore, Maryland

United States Court of Appeals for the Fourth Circuit

Decided March 20, 1962

Unreported

Cert. den., October 8, 1962. 371 U.S. 845, 9 L. Ed. 2d 80, 83 S. Ct. 77.

A certificate of probable cause is denied and the appeal in the above-entitled case dismissed because the issues presented are prematurely raised in the federal court. This action is without prejudice to any further application in another proceeding.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

ALBERT V. BRYAN,
United States Circuit Judge.

J. SPENCER BELL,
United States Circuit Judge.

March 20, 1962.